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DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 762

RIN: 0560–AG65

Guaranteed Farm Ownership and Operating Loan Requirements

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: The Farm Service Agency (FSA) is amending its regulations governing loans made under the guaranteed farm loan program to specifically allow lenders to use the loans as security for loans to the lenders, remove certain documentation and designation requirements for lenders, and modify security restrictions as to refinancing and junior liens.

DATES: This rule is effective September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Galen VanVleet, Senior Loan Officer, Farm Service Agency; telephone: (202) 720–3889; Facsimile: (202) 720–6797; E-mail: *Galen.VanVleet@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

FSA published a proposed rule on May 4, 2004, (69 FR 24537–24539) to amend its regulations governing loans made under the guaranteed farm loan program. The comment period ended July 6, 2004.

Summary of Public Comments

In response to the proposed rule, 125 respondents from 25 States and the District of Columbia commented. The following is a summary of the comments and the changes made in the final rule in response to the comments.

Certified Lender Program

FSA proposed to remove the requirement that lenders applying for Certified Lender Program (CLP) status submit copies of forms to be used for farm loan processing and servicing, such as financial statements, cash-flow plans, and budgets. One respondent noted that the existing requirement was of little burden and recommended that no change be made. However, 75 respondents endorsed the change; based on this response, the Agency adopts its proposed rule on CLP as final.

Preferred Lender Program

FSA proposed to remove the requirement that Preferred Lender Program (PLP) lenders designate a person or persons, approved by the Agency, to process and service PLP loans. Under the proposed rule PLP lenders would designate the responsible party by name, title, or position. All respondents supported this change, therefore, the Agency adopts its proposed rule on PLP as final.

Interest Rates and Fees

The existing rule at § 762.124(e)(1) provides that the lender may charge fees provided they are no greater than those charged to unguaranteed customers for similar transactions. FSA proposed that the lender not charge, or cause to be charged, any processing, servicing, or packaging fees that are not charged to nonguaranteed customers for similar transactions. Only three respondents supported the change, while 100 respondents opposed it because they interpreted that the change would disallow ''packager'' fees and they believed fewer guaranteed loans would be made as a result. Because of the overwhelming opposition, the proposal was not adopted nor the existing regulation changed.

Security Requirements

The existing rule at § 762.126(e) establishes restrictions on acceptable lien positions for security on guaranteed loans. The Agency proposed removing a restriction requiring that, when a loan is made for refinancing purposes, the guaranteed loan must hold a security position no lower than that on the refinanced loan. One respondent expressed concern that removal of the restriction would greatly increase the Government's risk of loss without any direct benefit to the loan applicant. That respondent suggested that in any case where the guaranteed loan debt is greater than or equal to 75 percent of the proposed security, the security position must be the same or better lien position than on the refinanced loan. Another respondent recommended that removal of the restriction be limited to situations where real estate loans are made to refinance operating carry-over debt. Another respondent recommended that the lender must hold a security position in the same or better collateral than on the refinanced loan. The other 74 respondents who commented on this section supported the change because it will help reduce confusion about proper lien positions and give lenders additional flexibility. The Agency does not agree that the removal of this restriction will greatly increase the risk of loss since the lenders are still responsible for ensuring that proper and adequate security is obtained to fully secure the loan, protect the interest of the lender and the Agency and assure repayment of the loan. Accordingly, the proposal is adopted as final.

Another restriction under the same section limits junior lien positions to situations where equity position is strong. Because this restriction has been confusing due to varying interpretations of ''strong,'' the Agency proposed clarifying the equity requirement by limiting junior liens to situations where the amount of debt is less than or equal to 75 percent of the value of the security. One respondent, who strongly supported the revision, recommended that the Agency clarify that this change applies to all lender types, including PLP. The Agency agrees with the point of this comment, but made no specific change to the regulation because all of § 762.126 already applies to all lender types.

Five respondents opposed the establishment of the 75-percent criterion. One respondent expressed concern that the requirement was too restrictive and recommended that no specific requirement be required for real estate, and a less restrictive requirement of 20 percent equity (80 percent debt-to-value of security) be established for chattels. Similarly, another respondent stated that the proposed requirement would be excessive when dealing with real estate security. A third respondent pointed out that the 75-percent loan-to-

value limit is more restrictive than supervisory limits established by Federal banking regulatory agencies. The fourth respondent opposed the change because it would be, in their view, detrimental to borrowers. The respondent stated that they, as a lender, would not take a second lien behind a large guaranteed loan. The final opposing respondent expressed concern that the establishment of a 75 percent requirement overemphasizes collateral while capacity and capital evaluation should be the deciding factors. The Agency agrees that the 75 percent requirement may be too restrictive and has increased the maximum loan to value limit to 85 percent accordingly.

Restructuring Guaranteed Loans

The existing regulation at § 762.145 (b)(6)(i) contains an incorrect citation to the loan limits, which the proposed rule corrected. No respondent commented on this provision and the proposed correction is adopted as final.

Sale, Assignment, and Participation

A new section, § 762.159, was proposed to address the use of guaranteed loans as security for lender funding. Many lenders routinely borrow money from Federal Home Loan Banks or Federal Reserve Banks to meet funding or liquidity needs. They are usually required to pledge loan assets, which may include guaranteed loans, as security for the loans. The existing regulation's restrictions on assignments have led to confusion as to how or whether a lender can pledge guaranteed loans. The proposed rule explicitly allowed the pledging to Federal Home Loan Banks or Federal Reserve Banks. The Agency received 93 comments concerning this proposal. While all respondents supported the goal of clarifying that guaranteed loans can be pledged as security for collateral, they also expressed some concerns. The respondents recommended that the proposed language saying that the guarantee would be unenforceable until a new eligible lender is substituted be removed. They correctly pointed out that other parts of the regulation provide protection to the Agency due to negligent servicing. The lender will remain responsible for properly servicing the account until an eligible lender is substituted, and deductions otherwise will be made according to § 762.149 as appropriate. The Agency agrees and has deleted the last two sentences in the final rule as unnecessary.

Respondents also recommended that the Agency provide users with any information about how to make the pledge; specifically, the respondents recommended that there be a proposed format to follow. The Agency determined that it is not appropriate to dictate a format or advise the lenders how to make a pledge because the Agency will not be a direct party to the pledging activity. Therefore, no change has been made in response to these comments.

Two respondents recommended that additional language be added to provide that a Federal Home Loan Bank or Federal Reserve Bank, as pledgee, be deemed a ''holder.'' These respondents correctly pointed out that, under the regulations, a holder may enforce the guarantee even if it is contestable, or unenforceable by the lender. There are other rights that holders have, in particular, the right to require purchase, however, that cannot accrue to a pledgee. Therefore, the Agency did not add language to deem the pledgee a holder.

One respondent pointed out that Farm Credit System institutions are required to, and routinely do, pledge all their loan assets, including those with Federal guarantees, to their funding bank. For clarity and consistency, in the final rule Farm Credit System Banks were added to the institutions that may pledge guaranteed loans, as well as other funding sources determined acceptable by the Agency.

Section § 762.160 deals with the sale, assignment, and participation of guarantees. The proposed rule clarified confusing portions and removed unnecessarily restrictive provisions. As used in the existing section and as defined in § 762.102, ''sale of guarantee'' and ''assignment of guarantee'' are synonymous. To reduce confusion, reference to ''sale of guarantee'' is removed. The one respondent who commented on the proposed changes to § 762.160 supported the changes; therefore, the Agency adopts this portion of the proposed rule as final.

Executive Order 12866

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

FSA certifies that this rule will not have a significant economic effect on a substantial number of small entities and therefore is not required to perform a Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act, Public Law 96–534, as amended (5 U.S.C. 601). An insignificant number of guaranteed loan borrowers and no lenders are small entities. This rule does not impact the small entities to a greater extent than large entities.

Environmental Impact Statement

FSA has determined that this action is not a major Federal action significantly affecting the environment. Therefore, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et. seq.*), neither an Environmental Impact Statement nor an environmental assessment is required.

Executive Order 12988

This rule has been reviewed in accordance with E.O. 12988, Civil Justice Reform. All State and local laws and regulations that are in conflict with this rule will be preempted. No retroactive effect will be given to this rule. It will not affect agreements entered into prior to the effective date of the rule. The administrative appeal provisions published at 7 CFR parts 11 and 780 must be exhausted before bringing any action for judicial review.

Executive Order 12372

For reasons set forth in the Notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983) the programs and activities within this rule are excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with state and local officials.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4), requires Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost-benefit assessment, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for state, local, or tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost-effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates, as defined by title II of the UMRA, for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Paperwork Reduction Act

The amendments to 7 CFR part 762 contained in this final rule require no

revisions to the information collection requirements that were previously approved by OMB under control number 0560–0155.

Federal Assistance Programs

These changes affect the following FSA programs as listed in the Catalog of Federal Domestic Assistance:

10.406—Farm Operating Loans
10.407—Farm Ownership Loans

List of Subjects in 7 CFR Part 762

Agriculture, Loan programs—Agriculture.

■ Accordingly, 7 CFR chapter VII is amended as follows:

PART 762—GUARANTEED FARM LOANS

■ 1. The authority citation for part 762 continues to read as follows:

Authority: 5 U.S.C. 301, 7 U.S.C. 1989.

§ 762.102 [Amended]

■ 2. In § 762.102 remove the definitions of ''Financially viable operation'', ''Participation'' and ''Sale of guaranteed portion.''

■ 3. Amend § 762.106 by removing paragraph (b)(8) and revising paragraph (c)(8) to read as follows:

§ 762.106 Preferred and certified lender programs.

* * * * *

(c) * * *

(8) Designate a person or persons, either by name, title, or position within the organization, to process and service PLP loans for the Agency.

* * * * *

■ 4. In § 762.126, remove paragraph (e)(1), redesignate paragraphs (e)(2), (e)(3), and (e)(4) as (e)(1), (e)(2), and (e)(3), respectively, and revise newly designated (e)(2) to read as follows:

§ 762.126 Security requirements.

(e) * * *

(2) Junior lien positions are acceptable only if the total amount of debt with liens on the security, including the debt in junior lien position, is less than or equal to 85 percent of the value of the security. Junior liens on crops or livestock products will not be relied upon for security unless the lender is involved in multiple guaranteed loans to the same borrower and also has the first lien on the collateral.

* * * * *

■ 5. Revise § 762.145 (b)(6)(i) to read as follows:

§ 762.145 Restructuring guaranteed loans.

* * * * *

(b) * * *

(6) * * *

(i) As a result of the capitalization of interest, a rescheduled promissory note may increase the amount of principal the borrower is required to pay. However, in no case will such principal amount exceed the statutory loan limits contained in § 761.8 of this chapter.

* * * * *

■ 6. Add § 762.159 to read as follows:

§ 762.159 Pledging of guarantee.

A lender may pledge all or part of the guaranteed or unguaranteed portion of the loan as security to a Federal Home Loan Bank, a Federal Reserve Bank, a Farm Credit System Bank, or any other funding source determined acceptable by the Agency.

■ 7. Revise § 762.160 to read as follows:

§ 762.160 Assignment of guarantee.

(a) The following general requirements apply to assigning guaranteed loans:

(1) Subject to Agency concurrence, the lender may assign all or part of the guaranteed portion of the loan to one or more holders at or after loan closing, if the loan is not in default. However, a line of credit cannot be assigned. The lender must always retain the unguaranteed portion in their portfolio, regardless of how the loan is funded.

(2) The Agency may refuse to execute the Assignment of Guarantee and prohibit the assignment in case of the following:

(i) The Agency purchased and is holder of a loan that was assigned by the lender that is requesting the assignment.

(ii) The lender has not complied with the reimbursement requirements of § 762.144(c)(7), except when the 180 day reimbursement or liquidation requirement has been waived by the Agency.

(3) The lender will provide the Agency with copies of all appropriate forms used in the assignment.

(4) The guaranteed portion of the loan may not be assigned by the lender until the loan has been fully disbursed to the borrower.

(5) The lender is not permitted to assign any amount of the guaranteed or unguaranteed portion of the loan to the loan applicant or borrower, or members of their immediate families, their officers, directors, stockholders, other owners, or any parent, subsidiary, or affiliate.

(6) Upon the lender's assignment of the guaranteed portion of the loan, the lender will remain bound to all obligations indicated in the Guarantee, Lender's Agreement, the Agency program regulations, and to future program regulations not inconsistent with the provisions of the Lenders Agreement. The lender retains all rights under the security instruments for the protection of the lender and the United States.

(b) The following will occur upon the lender's assignment of the guaranteed portion of the loan:

(1) The holder will succeed to all rights of the Guarantee pertaining to the portion of the loan assigned.

(2) The lender will send the holder the borrower's executed note attached to the Guarantee.

(3) The holder, upon written notice to the lender and the Agency, may assign the unpaid guaranteed portion of the loan. The holder must assign the guaranteed portion back to the original lender if requested for servicing or liquidation of the account.

(4) The Guarantee or Assignment of Guarantee in the holder's possession does not cover:

(i) Interest accruing 90 days after the holder has demanded repurchase by the lender, except as provided in the Assignment of Guarantee and § 762.144(c)(3)(iii).

(ii) Interest accruing 90 days after the lender or the Agency has requested the holder to surrender evidence of debt repurchase, if the holder has not previously demanded repurchase.

(c) Negotiations concerning premiums, fees, and additional payments for loans are to take place between the holder and the lender. The Agency will participate in such negotiations only as a provider of information.

Signed in Washington, DC, on September 1, 2005.

James R. Little,

Administrator, Farm Service Agency.

[FR Doc. 05–19126 Filed 9–23–05; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916 and 917

[Docket No. FV05–916–3 FR]

Nectarines and Peaches Grown in California; Increased Assessment Rates

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule increases the assessment rates established for the Nectarine Administrative Committee

and the Peach Commodity Committee (committees) for the 2005–06 and subsequent fiscal periods from $0.195 and $0.19, respectively, to $0.20 per 25-pound container or container equivalent of nectarines and peaches handled. The committees locally administer the marketing orders that regulate the handling of nectarines and peaches grown in California. Assessments upon nectarine and peach handlers are used by the committees to fund reasonable and necessary expenses of the programs. The fiscal period runs from March 1 through the last day of February. The assessment rates will remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Effective September 27, 2005.

FOR FURTHER INFORMATION CONTACT: Laurel May, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906; or George Kelhart, Technical Advisor, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938.

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or e-mail: *Jay.Guerber@usda.gov*.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement Nos. 85 and 124 and Order Nos. 916 and 917, both as amended (7 CFR parts 916 and 917), regulating the handling of nectarines and peaches grown in California, respectively, hereinafter referred to as the ''orders.'' The marketing agreements and orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the marketing orders now in effect, California nectarine and peach handlers are subject to assessments. Funds to administer the orders are derived from such assessments. It is intended that the assessment rates as issued herein will be applicable to all assessable nectarines and peaches beginning on March 1, 2005, and continue until amended, suspended, or terminated. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This rule increases the assessment rate established for the Nectarine Administrative Committee (NAC) for the 2005–06 and subsequent fiscal periods from $0.195 to $0.20 per 25-pound container or container equivalent of nectarines. This rule also increases the assessment rate established for the Peach Commodity Committee (PCC) for the 2005–06 and subsequent fiscal periods from $0.19 to $0.20 per 25-pound container or container equivalent of peaches.

The nectarine and peach marketing orders provide authority for the committees, with the approval of USDA, to formulate annual budgets of expenses and collect assessments from handlers to administer the programs. The members of the NAC and PCC are producers of California nectarines and peaches, respectively. They are familiar with the committees' needs, and with the costs for goods and services in their local area and are, therefore, in a position to formulate appropriate budgets and assessment rates. The assessment rates are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

NAC Assessment and Expenses

The NAC recommended, for the 2004–05 fiscal period, and USDA approved, an assessment rate of $0.195 that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other information available to USDA.

The NAC met on April 28, 2005, and discussed and unanimously recommended 2005–06 expenditures and an assessment rate of $0.20 per 25-pound container or container equivalent of nectarines. Subsequently, the NAC revised its budget recommendation because it anticipated higher administrative overhead expenses than it had forecast earlier. In a mail vote completed on June 28, 2005, the NAC unanimously recommended 2005–06 expenditures of $4,919,049. In comparison, the budgeted expenditures for 2004–05 were $5,162,866. The assessment rate of $0.20 is $0.005 higher than the rate currently in effect.

The rate increase was recommended to ensure that the NAC could meet its 2005–06 anticipated expenses and carry over a financial reserve that would provide adequate funds for promotional and other activities at the beginning of the 2006 season before assessment collections begin. Increasing the assessment rate from $0.195 to $0.20 per 25-pound container is expected to provide about $103,410 in additional assessment revenue, and should allow the NAC to start the 2006 season with about $342,347.

Expenditures recommended by the NAC for the 2005–06 fiscal period include $899,288 for administration, $1,167,381 for inspection, $203,230 for research, and $2,649,149 for domestic and international promotion. Budgeted expenses for these items in 2004–05 were $538,770 for administration, $1,153,676 for inspection, $308,568 for research, and $3,161,852 for domestic and international promotion.

The 2004–05 and 2005–06 budgeted expenses differ significantly because some individual line items have been moved to different expense categories for 2005–2006. However, NAC expenses are generally expected to be lower during the 2005–06 fiscal year compared to the 2004–05 fiscal year.

The 2005–06 NAC assessment rate was derived after considering anticipated fiscal year expenses; the estimated assessable nectarines of 22,004,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate financial reserve to carry the NAC into the 2006 season. The committee desires to maintain a financial reserve of approximately $340,000 to meet its obligations in the early part of each season, before handler assessments are

billed and received. To meet these goals, the NAC recommended an assessment rate of $0.20 per 25-pound containers or container equivalent. According to the committee, that assessment rate should result in an adequate financial reserve, yet one well within the maximum of approximately one year's expenses permitted by the order (§ 916.42).

PCC Assessment and Expenses

The PCC recommended for the 2004–05 fiscal period, and USDA approved, an assessment rate of $0.19 that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committee or other information available to USDA.

The PCC met on April 28, 2005, and discussed and unanimously recommended 2005–06 expenditures and an assessment rate of $0.20 per 25-pound container or container equivalent of peaches. Subsequently, the PCC revised its budget recommendation because it anticipated higher administrative overhead expenses than it had forecast earlier. In a mail vote completed on June 28, 2005, the PCC unanimously recommended 2005–06 expenditures of $5,095,709. In comparison, last year's budgeted expenditures were $5,178,003. The assessment rate of $0.20 is $0.01 higher than the rate currently in effect.

The rate increase was recommended to ensure that the PCC could meet its 2005–06 anticipated expenses and carry over a financial reserve that would provide adequate funds for promotional and other activities at the beginning of the 2006 season before assessment collections begin. Increasing the assessment rate from $0.19 to $0.20 per 25-pound container is expected to provide about $211,800 in additional assessment revenue, and should allow the PCC to start the 2006 season with about $418,201.

Expenditures recommended by the PCC for the 2005–06 fiscal period include $918,736 for administration, $1,260,160 for inspection, $204,833 for research, and $2,711,980 for domestic and international promotion. Budgeted expenses for these items in 2004–05 were $540,456 for administration, $1,240,520 for inspection, $208,570 for research, and $3,188,457 for domestic and international promotion.

The 2004–05 and 2005–06 budgeted expenses differ because some individual line items have been moved to different expense categories for 2005–2006. However, the PCC expenses are generally expected to be lower during the 2005–06 fiscal year compared to the 2004–05 fiscal year.

The 2005–06 PCC assessment rate was derived after considering anticipated PCC expenses; the estimated assessable peaches of 21,180,000 25-pound containers or container equivalents; the estimated income from other sources, such as interest; and the need for an adequate reserve to carry the PCC into the 2006 season. The committee desires to maintain a financial reserve of approximately $420,000 to meet its obligations in the early part of each season, before handler assessments are billed and received. To meet these goals, the PCC recommended an assessment rate of $0.20 per 25-pound container or container equivalent. According to the committee, that assessment rate should result in an adequate financial reserve, yet one well within the maximum of approximately one year's expenses permitted by the order (§ 917.38).

Continuance of Assessment Rates

The assessment rates established in this rule will continue in effect indefinitely unless modified, suspended, or terminated by USDA upon recommendation and information submitted by the committees or other available information.

Although these assessment rates will be in effect for an indefinite period, the committees will continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rates. The dates and times of committee meetings are available from the committees' Web site or USDA. Committee meetings are open to the public and interested persons may express their views at these meetings. USDA will evaluate the committees' recommendations and other available information to determine whether modification of the assessment rate for each committee is needed. Further rulemaking will be undertaken as necessary. The committee's 2005–06 budget and those for subsequent fiscal periods would be reviewed and, as appropriate, approved by USDA.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 210 California nectarine and peach handlers subject to regulation under the orders covering nectarines and peaches grown in California, and about 1,500 producers of these fruits in California. Small agricultural service firms, which include handlers, are defined by the Small Business Administration [13 CFR 121.201] as those whose annual receipts are less than $6,000,000. Small agricultural producers are defined by the Small Business Administration as those having annual receipts of less than $750,000. A majority of these handlers and producers may be classified as small entities.

The committees' staff has estimated that there are fewer than 26 handlers in the industry who could be defined as other than small entities. For the 2004 season, the committees' staff estimated that the average handler price received was $8.00 per container or container equivalent of nectarines or peaches. A handler would have to ship at least 750,000 containers to have annual receipts of $6,000,000. Given data on shipments maintained by the committees' staff and the average handler price received during the 2004 season, the committees' staff estimates that small handlers represent approximately 87 percent of all the handlers within the industry.

The committees' staff has also estimated that fewer than 20 percent of the producers in the industry could be defined as other than small entities. For the 2004 season, the committees' estimated the average producer price received was $5.00 per container or container equivalent for nectarines and peaches. A producer would have to produce at least 150,500 containers of nectarines and peaches to have annual receipts of $750,000. Given data maintained by the committees' staff and the average producer price received during the 2004 season, the committees' staff estimates that small producers represent more than 80 percent of the producers within the industry.

With an average producer price of $5.00 per container or container equivalent, and a combined packout of nectarines and peaches of 40,438,536 containers, the value of the 2004 packout is estimated to be $202,192,680. Dividing this total estimated grower revenue figure by the estimated number

of producers (1,500) yields an estimate of average revenue per producer of about $134,795 from the sales of peaches and nectarines.

This rule increases the assessment rates established for the NAC for the 2005–06 and subsequent fiscal periods from $0.195 to $0.20 per 25-pound container or container equivalent of nectarines and for the PCC for the 2005–06 and subsequent fiscal periods from $0.19 to $0.20 per 25-pound container or container equivalent of peaches.

The NAC recommended 2005–06 fiscal period expenditures of $4,919,049 for nectarines and an assessment rate of $0.20 per 25-pound container or container equivalent of nectarines. The assessment rate of $0.20 is $0.005 higher than the 2004–05 rate. The PCC recommended 2005–06 fiscal period expenditures of $5,095,709 for peaches and an assessments rate of $0.20 per 25-pound container or container equivalent of peaches. The assessment rate of $0.20 is $0.01 higher than the 2004–05 rate.

Analysis of NAC Budget

The quantity of assessable nectarines for the 2005–06 fiscal period is estimated at 20,682,000 25-pound container or container equivalents. Thus, the $0.20 rate should provide $4,136,400 in assessment income. Income derived from handler assessments, along with interest income, research grants, and funds from the committee's reserve, should be adequate to cover budgeted expenses and maintain their desired reserve.

The major expenditures recommended by the NAC for the 2005–06 year include 899,288 for administration, $1,167,381 for inspection, $203,230 for research, and $2,649,149 for domestic and international promotion. Budgeted expenses for these items in 2004–05 were $538,770, $1,050,000, $138,018, and $2,574,160, respectively.

The NAC recommended an increase in the assessment rate to meet anticipated 2005–06 expenses and preserve an acceptable financial reserve. A reserve of approximately $340,000 is needed to fund expenses for the following year until assessments for that year are received. The NAC reviewed and recommended 2005–06 expenditures of $4,919,049 and the increased assessment rate.

Analysis of PCC Budget

The quantity of assessable peaches for the 2005–06 fiscal year is estimated at 21,180,000 25-pound container or container equivalents. Thus, the $0.20 rate should provide $4,236,000 in assessment income. Income derived from handler assessments, along with interest income, research grants, and funds from the committee's reserves should be adequate to cover budgeted expenses and maintain their desired reserve.

The major expenditures recommended by the PCC for the 2005–06 year include $918,736 for administration, $1,260,160 for inspection, $204,833 for research, and $2,711,980 for domestic and international promotion. Budgeted expenses for these items in 2004–05 were $540,456, $1,240,520, $208,570, and $3,188,457, respectively.

The PCC recommended an increase in the assessment rate to meet anticipated 2005–06 expenses and preserve an acceptable financial reserve. A reserve of approximately $420,000 is needed to fund expenses for the following year until assessments for that year are received. The PCC reviewed and recommended 2005–06 expenditures of $5,095,709 and the increased assessment rate.

Considerations in Determining Expenses and Assessment Rates

Prior to arriving at these budgets, the committees considered information and recommendations from various sources, including, but not limited to: The Executive Committee, the Research Subcommittee, the International Programs Subcommittee, the Grade and Size Subcommittee, and the Domestic Promotion Subcommittee.

Each of the committees then reviewed the proposed expenses; the total estimated assessable 25-pound containers or container equivalents; and the estimated income from other sources, such as interest income and research grants, prior to recommending a final assessment rate. The NAC decided that an assessment rate of $0.20 per 25-pound container or container equivalent would allow it to meet its 2005–06 expenses and carry over an operating reserve of approximately $342,000, which is in line with the committee's financial needs. The PCC decided that an assessment rate of $0.20 per 25-pound container or container equivalent would allow it to meet its 2003–04 expenses and carry over an operating reserve of approximately $420,000, which is in line with the committee's financial needs. The committees then unanimously recommended these rates to USDA

A review of historical and preliminary information pertaining to the upcoming fiscal period indicates that the grower price for nectarines and peaches for the 2005–06 season could range between $4.00 and $6.00 per 25-pound container or container equivalent. Therefore, the estimated assessment revenue for the 2005–06 fiscal period as a percentage of total grower revenue could range between 3.33 and 5.0 percent.

This action increases the assessment obligation imposed on handlers. While assessments impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to producers. However, these costs are offset by the benefits derived from the operation of the marketing orders. In addition, the committees' meetings were widely publicized throughout the California nectarine and peach industries and all interested persons were invited to attend the meetings and participate in the committees' deliberations on all issues. Like all committee meetings, the April 28, 2004, meetings were public meetings and all entities, both large and small, were able to express views on this issue.

This rule imposes no additional reporting or recordkeeping requirements on either small or large handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

A proposed rule concerning this action was published n the **Federal Register** on August 22, 2005 (70 FR 48900). Copies of the proposed rule were also mailed or sent via facsimile to all nectarine and peach handlers. Finally, the proposal was made available through the Internet by USDA and the Office of the Federal Register. A 10-day comment period ending September 1, 2005, was provided for interested persons to respond to the proposal. Two comments supporting the proposal were received. Both cited reduced crop yields and the need to fund pre-harvest expenses next year as justification for the assessment rate increases. An additional response was received, but it was not relevant to the proposed assessment increase.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab.html*. Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation

submitted by the NAC and PCC and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) The 2005–06 fiscal period began on March 1, 2005, and the marketing orders require that the assessment rates for each fiscal period apply to all nectarines and peaches handled during such fiscal period; (2) the committees need to have sufficient funds to pay their expenses, which are incurred on a continuous basis; and (3) handlers are aware of this action, which was discussed by the committees at public meetings and unanimously recommended by a mail vote, and is similar to other assessment rate actions issued in past years. Also, a 10-day comment period was provided for in the proposed rule and the comments received have been considered in reaching a final decision on this matter.

List of Subjects

7 CFR Part 916

Marketing agreements, Nectarines, Reporting and recordkeeping requirements.

7 CFR Part 917

Marketing agreements, Peaches, Pears, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR parts 916 and 917 are amended as follows:

■ 1. The authority citation for 7 CFR parts 916 and 917 continue to read as follows:

Authority: 7 U.S.C. 601–674.

PART 916—NECTARINES GROWN IN CALIFORNIA

■ 2. Section 916.234 is revised to read as follows:

§ 916.234 Assessment rate.

On and after March 1, 2005, an assessment rate of $0.20 per 25-pound container or container equivalent of nectarines is established for California nectarines.

PART 917—PEACHES GROWN IN CALIFORNIA

■ 3. Section 917.258 is revised to read as follows:

§ 917.258 Assessment rate.

On and after March 1, 2005, an assessment rate of $0.20 per 25-pound container or container equivalent of peaches is established for California peaches.

Dated: September 20, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–19085 Filed 9–23–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1033

[Docket No. AO–166–A39; DA–05–01–A]

Milk in the Mideast Marketing Area; Interim Order Amending the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule.

SUMMARY: This order amends certain features of the pooling standards of the Mideast milk marketing order on an interim basis. More than the required number of producers in the Mideast marketing area have approved the issuance of the interim order as amended.

DATES: Effective October 1, 2005.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Associate Deputy Administrator, Stop 0231, Room 2971, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 690–1366, e-mail address: *gino.tosi@usda.gov*.

SUPPLEMENTARY INFORMATION: Specifically, this decision adopts provisions that will: (1) Prohibit the ability to simultaneously pool the same milk on the Mideast Federal milk order and on a marketwide equalization pool administered by another government entity; (2) Lower the diversion limit standards; and (3) Increase the performance standards for supply plants.

This administrative rule is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937 (the Act), as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (Department) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the District Court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this interim rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a ''small business'' if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a ''small business'' if it has fewer than 500 employees.

For the purposes of determining which dairy farms are ''small businesses,'' the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most ''small'' dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During March 2005, the month during which the hearing occurred, there were 9,767 dairy producers pooled on, and 36 handlers regulated by, the Mideast order. Approximately 9,212 producers,

or 94.3 percent, were considered small businesses based on the above criteria. Of the 36 handlers regulated by the Mideast order, approximately 26 handlers, or 72.2 percent, were considered small businesses.

The adoption of the proposed pooling standards serve to revise established criteria that determine those producers, producer milk and plants that have a reasonable association with, and are consistently serving the fluid needs of, the Mideast milk marketing area. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those producers who are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The established criteria are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these adopted amendments will have no impact on reporting, recordkeeping, or other compliance requirements because they will remain identical to the current requirements. No new forms are proposed and no additional reporting requirements will be necessary.

This action does not require additional information collection that requires clearance by the Office of Management and Budget (OMB) beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Prior documents in this proceeding:

Amendment to Public Hearing on Proposed Rulemaking: Issued March 1, 2005; published March 3, 2005 (70 FR 10337).

Notice of Hearing: Issued February 14, 2005; published February 17, 2005 (70 FR 8043).

Tentative Partial Decision: Issued July 21, 2005; published July 27, 2005 (70 FR 43335).

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the Mideast order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the Mideast order:

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Mideast marketing area.

Upon the basis of the evidence introduced at such hearing and the record thereof it is found that:

(1) The Mideast order, as hereby amended on an interim basis, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the order, as hereby amended on an interim basis, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The Mideast order, as hereby amended on an interim basis, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

(b) *Additional Findings.* It is necessary and in the public interest to make these interim amendments to the Mideast order effective October 1, 2005. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the aforesaid marketing area.

The interim amendments to this order are known to handlers. The tentative partial final decision containing the proposed amendments to this order was issued on July 21, 2005.

The changes that result from these interim amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making these interim order amendments effective on October 1, 2005.

(c) *Determinations.* It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Section 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the specified marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this interim order amending the Mideast order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order as hereby amended;

(3) The issuance of the interim order amending the Mideast order is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the marketing area.

List of Subjects in 7 CFR Part 1033

Milk marketing orders.

Order Relative to Handling

■ *It is therefore ordered,* that on and after the effective date hereof, the handling of milk in the Mideast marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby further amended on an interim basis, as follows:

PART 1033—MILK IN THE MIDEAST AREA

■ 1. The authority citation for 7 CFR Part 1033 reads as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 1033.7 is amended by:
■ (a) Revising paragraph (c) introductory text.
■ (b) Revising the introductory text of paragraph (d).
■ (c) Revising paragraph (d)(2).
■ (d) Revising paragraph (e)(1).

The revisions read as follows:

§ 1033.7 Pool plant.

* * * * *

(c) A supply plant from which the quantity of bulk fluid milk products shipped to, received at, and physically unloaded into plants described in paragraph (a) or (b) of this section as a percent of the Grade A milk received at the plant from dairy farmers (except

dairy farmers described in § 1033.12(b)) and handlers described in § 1000.9(c), as reported in § 1033.30(a), is not less than 40 percent of the milk received from dairy farmers, including milk diverted pursuant to § 1033.13, subject to the following conditions:

* * * * *

(d) A plant located in the marketing area and operated by a cooperative association if, during the months of December through July 30 percent, during the month of August 35 percent and during the months of September through November 40 percent or more of the producer milk of members of the association is delivered to a distributing pool plant(s) or to a nonpool plant(s) and classified as Class I. Deliveries for qualification purposes may be made directly from the farm or by transfer from such association's plant, subject to the following conditions:

* * * * *

(2) The 30 percent delivery requirement for the months of December through July may be met for the current month or it may be met on the basis of deliveries during the preceding 12-month period ending with the current month.

* * * * *

(e) * * *

(1) The aggregate monthly quantity supplied by all parties to such an agreement as a percentage of the producer milk receipts included in the unit during the months of August through November is not less than 45 percent and during the months of December through July is not less than 35 percent;

* * * * *

■ 3. Section 1033.13 is amended by:
■ (a) Revising paragraph (d)(4).
■ (b) Adding paragraph (e).

The revisions read as follows:

§ 1033.13 Producer milk.

* * * * *

(d) * * *

(4) Of the total quantity of producer milk received during the month (including diversions but excluding the quantity of producer milk received from a handler described in § 1000.9(c) or which is diverted to another pool plant), the handler diverted to nonpool plants not more than 50 percent in each of the months of August through February and 60 percent in each of the months of March through July.

* * * * *

(e) Producer milk shall not include milk of a producer that is subject to inclusion and participation in a marketwide equalization pool under a milk classification and pricing plan imposed under the authority of another government entity.

Dated: September 20, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–19086 Filed 9–23–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1430

RIN 0560–AH28

2004 Dairy Disaster Assistance Payment Program

AGENCIES: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This rule sets forth the regulations for the 2004 Dairy Disaster Assistance Payment Program. This program will assist dairy producers by providing payments to those who suffered dairy production and milk spoilage losses due to hurricanes in 2004.

DATES: This rule is effective on September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Danielle Cooke, Price Support Division, Farm Service Agency, United States Department of Agriculture, STOP 0512, 1400 Independence Avenue, SW., Washington, DC 20250–0512. Telephone: (202) 720–1919; e-mail: *Danielle.Cooke@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Discussion of Final Rule

This rule finalizes the proposed rule published in the **Federal Register** May 25, 2005 (70 FR 30009). The 30-day comment period for the proposed 2004 Dairy Disaster Assistance Payment Program (DDAP) rule closed on June 24, 2005. The proposed rule provided that the DDAP program would be based on hurricane related dairy production and dairy spoilage losses suffered during the months of August through October 2004 in counties declared a disaster by the President in 2004 due to hurricane. The program will end at the conclusion of the application period and disbursement of allotted funds. The DDAP program will operate under regulations codified in 7 CFR part 1430.

Among other provisions, the proposed rule provided that in cases where the producers had been paid for qualified dumped milk the producer would still qualify for payments related to that milk. Also, the rule did not provide for adjustments in payments based on cow herd size. Rather, the rule provided for payments to be made based on changes in milk production from a set base amount. Also, among other provisions, the rule provided that in the case the limited program funds were not sufficient to pay all claims for lost production and for dumped milk, then priority would be given in making payments to those persons whose losses over the whole period were greater than 20 percent. It was provided additionally in the proposed rule that the prices at which payments would be made would be amounts set out in the rule which were derived from a series of reported ''mailbox'' prices. On these aspects and all others, comment was invited.

Comments and Changes to Final Rule

During the 30-day comment period the Agency received public comments from two U.S. Senators, ten U.S. congressmen, one dairy cooperative, one advocacy group and two private citizens. Some responses contained multiple comments.

Of the total comments received during the public comment period, two respondents opposed the program indicating that private insurance should adequately compensate dairy producers monetarily for losses rather than the taxpayers or Government. One of those respondents also believed that the assistance being provided by the Agency was duplicative to that of Federal Emergency Management Agency (FEMA) and that it was misleading for Congress to insert a statute for agriculture in a non-related military spending bill. No changes have been made in the rule based on these comments. The agency is charged with implementing statutory provisions as written and has done so in the final rule. It is not understood to be the case that the relief in the rule duplicates that provided elsewhere, but provision is made in the rule to address that possibility.

Public comments and suggestions were sought for paying milk marketing cooperatives directly for milk that was dumped. Several public comments were received in support of direct payment of DDAP benefits to a milk handler or dairy marketing cooperative rather than directly to the producer for spoiled milk that was dumped as a result of the hurricanes for which the dairy marketing cooperative or milk handler compensated the dairy producer. Respondents indicated that marketing cooperatives have adequate records to verify dumped production and confirm payment to producers made by the dairy

marketing cooperative or milk handler. Respondents also believed that the precedent of direct payments to marketing cooperatives has been established in past USDA programs. Also, one respondent suggested that producers would be compensated twice for the same loss if payment is made directly to a producer in a dairy operation for dumped milk that was paid for by the dairy marketing cooperative or milk handler. The Agency determined that no change was warranted. The statute provides for payments to producers. The proposed rule set out a fair plan for all losses and does not prohibit private readjustments.

Several comments were received from the public regarding payment rates being based on the average monthly ''mailbox'' milk price as provided by the applicable State Marketing Order as reported by the USDA, Agricultural Marketing Service (AMS) during the eligible months. The ''mailbox'' milk price, the pricing basis incorporated into the proposed rule, is defined by AMS as: ''The net pay price received by dairy farmers for milk and includes all payments received for milk sold and all costs associated with marketing the milk. Price is a weighted average for the reporting area and is reported at the average butterfat test.'' The respondents suggested using, instead of the mailbox milk price, the Federal Milk Marketing Order blend prices during the eligible months. Respondents suggested that the Federal Milk Marketing Order blend prices are more accurate because they adjust for location differences and recognize the regional costs of production. The payment plan proposed provides fair compensation and sufficient differentiation. No change was found to be warranted.

Many respondents requested clarification regarding the limitation on multiple benefits that prohibit a producer from being compensated more than once for the same loss. Specifically, respondents wanted to ensure that benefits received from the Emergency Conservation Program (ECP) did not preclude a DDAP program applicant from receiving DDAP benefits. The Agency does not believe that this point requires a change in the rule, but notes that ECP benefits are understood to be different from those provided for in this program.

Comments were requested on the method of payment at two levels in the event of inadequate funds for all eligible losses and the appropriate loss level percentage. No comments on this issue were received and no change in that provision was needed.

One comment received requested expeditious implementation of the program. We have endeavored to provide for such implementation with a due concern for assuring a certain and efficient administration of the program benefits.

One respondent commented on the use of plain language and consistency throughout the proposed rule and provided editorial recommendations to improve the clarity of the rule and better comply with Executive Order requirements. The respondent's suggested recommendations are editorial and do not affect the substantive requirements of the proposed rule. Recommendations have been adopted where practical and incorporated throughout. Clarifications have been made where needed.

Most of the comments received indicated that the loss calculation was not equitable to dairy operations that added cows to the milking herd to offset production losses during the eligible months following the 2004 hurricanes. These respondents were in support of an adjustment to the loss calculation that is reflective of cows added to the milking herd to compensate for loss production as a result of the hurricanes. After careful consideration of the recommendations proposed by the respondents, the Agency will provide a production credit to the dairy operation's calculated losses for the addition of cows to the milking herd as a result of the hurricanes, provided adequate proof of purchase containing the date of purchase and number of head purchased is provided to CCC to substantiate the dairy operations claim of dairy cow purchases during the eligible months. In addition, dairy operations must report any decreases to the milking herd as a result of sale or death. The production credit will be calculated using the July 2004 per-cow production average and based on dairy cow increases or decreases to the milking herd and the corresponding days of ownership during each eligible month.

Executive Order 12866

This rule has been determined to be not significant under Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking with respect to the subject of this rule.

Environmental Assessment

The environmental impacts of this rule have been considered consistent with the provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA's regulations for compliance with NEPA, 7 CFR part 799. To the extent these authorities may apply, CCC has concluded that this rule is categorically excluded from further environmental review as evidenced by the completion of an environmental evaluation. No extraordinary circumstances or other unforeseeable factors exist which would require preparation of an environmental assessment or environmental impact statement. A copy of the environmental evaluation is available for inspection and review upon request.

Executive Order 12988

The rule has been reviewed in accordance with Executive Order 12998. This final rule preempts State laws to the extent such laws are inconsistent with it. This rule is not retroactive. Before judicial action may be brought concerning this rule, all administrative remedies set forth at 7 CFR parts 11 and 780 must be exhausted.

Executive Order 12372

This program is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule because CCC is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject of this rule. Further, this rule contains no unfunded mandates as defined in sections 202 and 205 of UMRA.

Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995, the Office of Management and Budget (OMB) has approved the information collection required to support this program and assigned it OMB control number 0560. Copies of the information collection may be obtained from Danielle Cooke, phone: (202) 720–1919; e-mail: *Danielle.Cooke@wdc.usda.gov.*

Government Paperwork Elimination Act

CCC is committed to compliance with the Government Paperwork Elimination Act (GPEA) and the Freedom to E-File Act, which require Government agencies in general, and FSA in particular, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. The forms and other information collection activities required to be utilized by a person subject to this rule are not yet fully implemented in a way that would allow the public to conduct business with CCC electronically. Accordingly, at this time, all forms required to be submitted under this rule may be submitted to CCC by mail or FAX.

List of Subjects in 7 CFR Part 1430

Dairy, Disaster assistance, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, 7 CFR part 1430 is amended as follows:

PART 1430—DAIRY PRODUCTS

■ 1. The authority citation for part 1430 is revised to read as follows:

Authority: 7 U.S.C. 7981 and 7982; 15 U.S.C. 714b and 714c; Pub. L. 108–324, 118 Stat. 1220.

■ 2. Add Subpart C to read as follows:

Subpart C—2004 Dairy Disaster Assistance Payment Program

Sec.

Subpart C—2004 Dairy Disaster Assistance Payment Program

§ 1430.300 Applicability.

(a) Subject to the availability of funds, this subpart sets forth the terms and conditions applicable to the 2004 Dairy Disaster Assistance Payment Program authorized by section 103 of Division B of Public Law 108–324. Benefits are available to eligible United States producers who have suffered dairy production losses and dairy spoilage losses in eligible counties as a result of a hurricane disaster in 2004.

(b) To be eligible for this program, a producer must have been a milk producer in 2004 in a county declared a disaster by the President of the United States due to a 2004 hurricane. Only losses occurring in those counties are eligible for payment in this program. Producers in contiguous counties that were not designated by the President as a disaster county due to a hurricane in 2004 are not eligible.

(c) Subject to the availability of funds, benefits shall be provided by the Commodity Credit Corporation (CCC) to eligible dairy producers. Additional terms and conditions may be set forth in the payment application that must be executed by participants to receive a disaster assistance payment for dairy production losses and dairy spoilage losses.

(d) To be eligible for payments, producers must comply with the provisions of, and their losses must meet the conditions of, this subpart and any other conditions imposed by CCC.

§ 1430.301 Administration.

(a) The 2004 Dairy Disaster Assistance Payment Program shall be administered under the general supervision of the Executive Vice President, CCC (Administrator, FSA), or a designee, and shall be carried out in the field by FSA State and county committees (State and county committees) and FSA employees.

(b) State and county committees, and representatives and employees thereof, do not have the authority to modify or waive any of the provisions of the regulations of this subpart.

(c) The State committee shall take any action required by the regulations of this subpart that has not been taken by the county committee. The State committee shall also:

(1) Correct, or require the county committee to correct, any action taken by such county committee that is not in accordance with the regulations of this subpart; and

(2) Require a county committee to withhold taking any action that is not in accordance with the regulations of this subpart.

(d) No provision of delegation in this subpart to a State or county committee shall preclude the Executive Vice President, CCC, or a designee, from determining any question arising under the program or from reversing or modifying any determination made by the State or county committee.

(e) The Deputy Administrator, Farm Programs, FSA, may authorize State and county committees to waive or modify deadlines in cases where lateness or failure to meet such requirements do not adversely affect the operation of the 2004 Dairy Disaster Assistance Payment Program and does not violate statutory limitations on the program.

(f) Data furnished by the applicants is used to determine eligibility for program benefits. Although participation in the 2004 Dairy Disaster Assistance Payment Program is voluntary, program benefits are not to be provided unless the participant furnishes all requested data.

§ 1430.302 Definitions.

The definitions set forth in this section shall be applicable for all purposes of administering the 2004 Dairy Disaster Assistance Payment Program established by this subpart.

Application means the 2004 Dairy Disaster Assistance Payment Program Application.

Application period means the time period established by the Deputy Administrator for producers to apply for program benefits.

CCC means the Commodity Credit Corporation of the Department.

County committee means the FSA county committee.

County office means the FSA office responsible for administering FSA programs for farms located in a specific area in a state.

Dairy operation means any person or group of persons who, as a single unit, as determined by CCC, produces and markets milk commercially from cows and whose production facilities are located in the United States.

Department or USDA means the United States Department of Agriculture.

Deputy Administrator means the Deputy Administrator for Farm Programs (DAFP), FSA, or a designee.

Disaster county means a county declared a disaster by the President of the United States due to a hurricane in 2004, and is only the county so declared, not a contiguous county.

Farm Service Agency or FSA means the Farm Service Agency of the Department.

Hundredweight or cwt. means 100 pounds.

Milk handler or cooperative means the marketing agency to, or through which, the producer commercially markets whole milk.

Milk marketings means a marketing of milk for which there is a verifiable sales or delivery record of milk marketed for commercial use. In counting milk toward production amounts, dumped

milk will not be considered as marketed for commercial use. Such dumped milk shall be counted toward production but will be accounted for separately from milk that is marketed for normal commercial use as determined by the Deputy Administrator. All production in the months for which loss coverage is available will be counted in making determinations under this part, as determined by the Deputy Administrator, with care to avoid double counting, and with care to avoid a calculated loss that overstates the actual losses.

Payment pounds means the pounds of milk production from a dairy operation for which the dairy producer is eligible to be paid under this subpart.

Producer means any individual, group of individuals, partnership, corporation, estate, trust association, cooperative, or other business enterprise or other legal entity who is, or whose members are, a citizen of, or legal resident alien in the United States, and who directly or indirectly, as determined by the Secretary, shares in the risk of producing milk, and makes contributions (including land, labor, management, equipment, or capital) to the dairy farming operation of the individual or entity of the proceeds of this operation.

Starting base production means actual commercial production marketed by the dairy operation during the month of July 2004, or alternative period established by the Deputy Administrator.

Verifiable production records means evidence that is used to substantiate the amount of production marketed, including any dumped production, and that can be verified by CCC through an independent source.

§ 1430.303 Time and method of application.

(a) Dairy producers may obtain an Application, in person, by mail, by telephone, or by facsimile from any county FSA office. In addition, applicants may download a copy of the Application at *http://www.sc.egov.usda.gov*.

(b) A request for benefits under this subpart must be submitted on a completed Application as defined in § 1430.302. Applications and any other supporting documentation shall be submitted to the FSA county office serving the county where the dairy operation is located but, in any case, must be received by the FSA county office by the close of business on the date established by the Deputy Administrator. The closing date shall be no sooner than October 11, 2005. Applications not received by the close of business on such date will be disapproved as not having been timely filed and the dairy producer will not be eligible for benefits under this program.

(c) All persons who share in the risk of a dairy operation's total production must certify to the information on the Application before the Application is considered complete.

(d) Each dairy producer requesting benefits under this subpart must certify to the accuracy and truthfulness of the information provided in their application and any supporting documentation. All information provided is subject to verification by CCC. Refusal to allow CCC or any other agency of the Department of Agriculture to verify any information provided will result in a denial of eligibility. Furnishing the information is voluntary; however, without it program benefits will not be approved. Providing a false certification to the Government may be punishable by imprisonment, fines and other penalties or sanctions.

§ 1430.304 Eligibility.

(a) Producers in the United States are eligible to receive hurricane-related dairy disaster benefits under this part only if they have suffered dairy production or dairy spoilage losses in counties declared a disaster by the President due to any hurricane in 2004. To be eligible to receive payments under this subpart, producers in a dairy operation must:

(1) Have produced and commercially marketed milk in the United States and commercially marketed the milk produced during the 2004 calendar year;

(2) Be a producer on a dairy farm operation physically located in a disaster county where production and milk spoilage losses were incurred as a result of 2004 hurricanes, and limiting their claims to losses occurring in those counties;

(3) Provide proof of monthly milk production dumped and commercially marketed by all persons in the eligible dairy operation during the third quarter of the 2004 milk marketing year, or other period as determined by FSA, to determine the total pounds of eligible losses that will be used for payment; and

(4) Apply for payments during the application period established by the Deputy Administrator.

(b) Payments may be made for losses suffered by an otherwise eligible producer who is now deceased or is a dissolved entity if a representative who currently has authority to enter into a contract for the producer or the producer's estate signs the application for payment. Proof of authority to sign for the deceased producer's estate or a dissolved entity must be provided. If a producer is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly-authorized representatives must sign the application for payment.

(c) Producers associated with a dairy operation must submit a timely application and comply with terms and conditions of this subpart, instructions issued by CCC and instructions contained in the Application to be eligible for benefits under this subpart.

(d) As a condition to receive benefits under this part, a producer must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of 7 CFR part 12 for the 2004 calendar year, as applicable, and must not otherwise be barred from receiving benefits under 7 CFR part 12 or any other law or regulation.

(e) Payments are limited to losses in eligible counties in eligible months.

(f) All payments under this part are subject to the availability of funds.

§ 1430.305 Proof of production.

(a) Evidence of production is required to establish the commercial marketing and production history of the dairy operation so that production and spoilage losses can be computed in accordance with § 1430.306.

(b) A dairy producer must, based on the instructions issued by the Deputy Administrator, provide adequate proof of the dairy operation's commercial production, including any dumped production and dairy cow purchases, for each month of the period July 2004 through October 2004, and must specifically identify any dumped production for August through October 2004. If a month other than July 2004 is used for base creation purposes records for that month must be provided.

(1) A producer must certify and provide such proof as requested that losses for which compensation is claimed were hurricane-related and occurred in an eligible county in an eligible month.

(2) Additional supporting documentation may be requested by FSA as necessary to verify production or spoilage losses and dairy herd increases or decreases to the satisfaction of FSA.

(c) Adequate proof of production history of the dairy operation under paragraph (b) of this section must be based on milk marketing statements obtained from the dairy operation's milk handler or marketing cooperative. Supporting documents may include, but are not limited to: tank records, milk

handler records, daily milk marketings, copies of any payments received from other sources for production or spoilage losses, or any other documents available to confirm the production history and losses incurred by the dairy operation.

(d) Adequate proof of dairy cow additions to the milking herd during the eligible months can include, but are not limited to sales receipts, invoices, State health certificates, or any other documents available to confirm the cow purchases.

(e) All information provided to FSA by a producer is subject to verification, spot-check and audit by FSA. Also, FSA or another CCC representative may examine the dairy operation's production or spoilage claims.

(f) If adequate proof of commercially-marketed production and supporting documentation is not presented to the satisfaction of CCC or FSA, the request for benefits will be rejected. In the case of a new producer that had no verifiable, actual, commercial production marketed by the dairy operation during the month of July 2004, but which suffered eligible losses, an alternate base period may be established by the Deputy Administrator.

§ 1430.306 Determination of losses incurred.

(a) Eligible payable losses are calculated on a dairy operation by dairy operation basis and are limited to those occurring in August through October 2004. Specifically, dairy production and spoilage losses incurred by producers under this subpart are determined on the established history of the dairy operation's actual commercial production marketed from August through October 2004, and actual production dumped or otherwise not marketed from August through October 2004, as provided by the dairy operation consistent with § 1430.305. Except as otherwise provided in these regulations, the starting base production, as defined in § 1430.302, is adjusted downward by a percentage determined by CCC to determine the base production for the months of August through October 2004. These adjustments are made to account for the seasonal declines that can occur during those months. The base production for each of the months August through October 2004 is calculated by reducing the starting base production (July 2004, or alternate month approved by the Deputy Administrator for new producers) as follows:

(1) August 2004 base production is the starting base production reduced by 9 percent;

(2) September 2004 base production is the starting base production reduced by 15 percent;

(3) October 2004 base production is the starting base production reduced by 11 percent.

(b) The eligible dairy production losses for a dairy operation for each of the months of August through October 2004 will be:

(1) The new base production for the dairy operation calculated under paragraph (a) of this section less,

(2) For each such month for each dairy operation, the total of:

(i) Actual commercially-marketed production (not counting dumped production counted under paragraph (b)(1)(ii) of this section); plus

(ii) The pounds of milk production dumped (whether related to the hurricane or not), or otherwise not commercially marketed (whether related to the hurricane or not). For dumping losses to be eligible, they must, as with other program losses, be hurricane related, as described under paragraphs (c) and (d) of this section.

(c) Actual production losses may be adjusted to the extent the reduction in production is not certified by the producer to be the result of the hurricane or is determined by FSA not to be hurricane-related. Actual production, as adjusted, that exceeds the adjusted base production will mean that the dairy operation incurred no eligible production losses for the corresponding month as a result of the hurricane disaster, and that the production level for that month does not qualify for a payment under this program.

(d) Eligible dairy spoilage losses incurred by producers under this subpart for each of the months August through October 2004 will be determined based on actual milk produced in those months that was dumped on the farm as a result of the 2004 hurricanes. Proper documentation of milk dumped on the farm as a result of spoilage due to a hurricane must be provided to CCC as provided in § 1430.305.

(e) Calculated production losses may be adjusted by FSA based on the monthly average of daily dairy cow additions or reductions to the milking herd during the period of July 1, 2004 through October 31, 2004, to account for production adjustments as a result of dairy cow purchases, sales, or death losses. Production adjustments can be calculated using the average number of dairy cows in a dairy operation's milking herd and the average production per cow during each applicable month. Per-cow production averages during the months of August through October will be determined based on the actual per-cow production average during the month of July 2004 and reduced downward according to the seasonal decline percentages provided in paragraph (a) of this section, to determine the total production that may be credited back to the dairy operation's total production losses. To qualify for the production adjustment:

(1) Producers in eligible dairy operations must report any increases or decreases to the dairy cow milking herd during the period of July 1, 2004 through October 31, 2004.

(2) Adequate supporting documentation according to § 1430.305 must be provided to the satisfaction of the COC to verify any claims of herd increases or decreases during the eligible period.

(3) Any cows purchased during the eligible period that would increase the dairy cow milking herd must have been to offset production losses as a result of the 2004 hurricanes.

(f) Eligible production and spoilage losses as otherwise determined under paragraphs (a) through (e) of this section are added together to determine total eligible losses incurred by the dairy operation subject to all other eligibility requirements as may be included in this part or elsewhere.

(g) Payment on eligible dairy operation losses is calculated using whole pounds of milk. No double counting is permitted, and only one payment will be made for each pound of milk calculated as an eligible loss after the distribution of the operation's eligible production loss among the producers of the dairy operation according to § 1420.307(b). Payments under this part will not be affected by any payments for dumped or spoiled milk that the dairy operation may have received from its milk handler, or marketing cooperative, or any other private party.

(h) If a producer is eligible to receive payments under this part and benefits under any other program administered by the Secretary for the same losses, the producer must choose whether to receive the other program benefits or payments under this part, but shall not be eligible for both. The limitation on multiple benefits prohibits a producer from being compensated more than once for the same losses. If the other USDA program benefits are not available until after an application for benefits has been filed under this part, the producer may, to avoid this restriction on such other benefits, refund the total amount of the payment to the administrative FSA

office from which the payment was received.

§ 1430.307 Rate of payment and limitations on funding.

(a) Subject to the availability of funds, the payment rate for eligible production and spoilage losses determined according to § 1430.306 is, depending on the State, the average monthly Mailbox milk price for the Florida, the Southeast, or the Appalachian States Marketing Orders as reported by the Agricultural Marketing Service during the months of August, September, and October of 2004. Maximum payment rates for eligible losses for dairy operations located in specific states are as follows:

(1) Florida—$17.62 per hundredweight ($0.1762 per pound).

(2) Alabama, Georgia, Louisiana, and Mississippi—$16.26 per hundredweight ($0.1626 per pound).

(3) North Carolina and South Carolina—$15.59 per hundredweight ($0.1559 per pound).

(b) Subject to the availability of funds, each eligible dairy operation's payment is calculated by multiplying the applicable payment rate under paragraph (a) of this section by the operation's total eligible losses. Where there are multiple producers in the dairy operation, individual producers' payments are disbursed according to each producer's share of the dairy operation's production as specified in the Application.

(c) If the total value of losses claimed under paragraph (b) of this section exceeds the $10 million available for the 2004 Dairy Disaster Assistance Payment Program, less any reserve that may be created under paragraph (e) of this section, total eligible losses of individual dairy operations that, as calculated as an overall percentage for the full three month period, August–October 2004 (not a monthly average for any one month), are greater than 20 percent of the total base production for those three months will be paid at the maximum rate under paragraph (a) of this section to the extent available funding allows. A loss of over 20 percent in only one or two of the eligible months does not itself qualify for the maximum per-pound payment. Total eligible losses for a producer, as calculated under § 1430.306, of less than or equal to 20 percent during the eligibility period of August to October 2004 will be paid at a rate determined by dividing the eligible losses of less than 20 percent by the funds remaining after making payments for all eligible losses above the 20 percent threshold.

(d) In no event shall the payment exceed the value determined by multiplying the producer's total eligible loss times the average price received for commercial milk production in their area as defined in paragraph (a) of this section.

(e) A reserve may be created to handle claims that extend beyond the conclusion of the application period, but claims shall not be payable once the available funding is expended.

§ 1430.308 Availability of funds.

The total available program funds shall be $10 million as provided by section 103 of Division B of Public Law 108–324.

§ 1430.309 Appeals.

Any producer who is dissatisfied with a determination made pursuant to this subpart may request reconsideration or appeal of such determination in accordance with the appeal regulations set forth at 7 CFR parts 11 and 780. Appeals of determinations of ineligibility or payment amounts are subject to the limitations in §§ 1430.307 and 1430.308.

§ 1430.310 Misrepresentation and scheme or device.

(a) In addition to other penalties, sanctions or remedies as may apply, a dairy producer shall be ineligible to receive assistance under this program if the producer is determined by FSA or CCC to have:

(1) Adopted any scheme or device that tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to any person or operation engaged in a misrepresentation, scheme, or device, shall be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and any dairy operation or person receiving payment under this subpart shall be jointly and severally liable with other persons or operations involved in such claim for benefits for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies that may apply.

§ 1430.311 Death, incompetence, or disappearance.

In the case of death, incompetency, disappearance, or dissolution of a person that is eligible to receive benefits in accordance with this subpart, such alternate person or persons specified in 7 CFR part 707 may receive such benefits, as determined appropriate by FSA.

§ 1430.312 Maintaining records.

Persons applying for benefits under this program must maintain records and accounts to document all eligibility requirements specified herein. Such records and accounts must be retained for 3 years after the date of payment to the dairy operations under this program. Destruction of the records after such date shall be at the risk of the party undertaking the destruction.

§ 1430.313 Refunds; joint and several liability.

(a) Excess payments, payments provided as the result of erroneous information provided by any person, or payments resulting from a failure to comply with any requirement or condition for payment under the application or this subpart, must be refunded to CCC.

(b) A refund required under this section shall be due with interest determined in accordance with paragraph (d) of this section and late payment charges as provided in 7 CFR part 1403.

(c) Persons signing a dairy operation's application as having an interest in the operation shall be jointly and severally liable for any refund and related charges found to be due under this section.

(d) Interest shall be applicable to any refunds required in accordance with 7 CFR parts 792 and 1403. Such interest shall be charged at the rate the United States Department of the Treasury charges CCC for funds, and shall accrue from the date FSA or CCC made the erroneous payment to the date of repayment.

(e) FSA may waive the accrual of interest if it determines that the cause of the erroneous determination was not due to any action of the person, or was beyond the control of the person committing the violation. Any waiver is at the discretion of FSA alone.

§ 1430.314 Miscellaneous provisions.

(a) *Offset.* CCC may offset or withhold any amount due CCC under this subpart in accordance with 7 CFR part 1403.

(b) *Claims.* Claims or debts are settled in accordance with 7 CFR part 1403.

(c) *Other interests.* Payments or any portion thereof due under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the livestock, or proceeds thereof, in favor of the owner or any other creditor except agencies and

instrumentalities of the U.S. Government.

(d) *Assignments.* Any producer entitled to any payment under this part may assign any payments in accordance with the provisions of 7 CFR part 1404.

§ 1430.315 Termination of program.

This program ends after payment has been made to those applicants certified as eligible pursuant to the application period established in § 1430.304. All eligibility determinations shall be final except as otherwise determined by the Deputy Administrator.

Signed at Washington, DC, on September 13, 2005.

James R. Little,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 05–19127 Filed 9–23–05; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 250 and 256

RIN 1010–AD16

Oil, Gas, and Sulphur Operations and Leasing in the Outer Continental Shelf (OCS)—Cost Recovery

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final rule; delay of effective date.

SUMMARY: MMS is delaying until January 1, 2006, the effective date of a rule that will implement fees to offset MMS's costs of providing certain services related to its mineral programs. This delay is necessary because of damage caused in the New Orleans area by Hurricane Katrina and subsequent flooding. The delay will provide relief to the government and the oil and gas industry as they recover from this disaster.

DATES: The effective date of the rule amending 30 CFR Parts 250 and 256 published at 70 FR 49871, August 25, 2005 is delayed until January 1, 2006.

FOR FURTHER INFORMATION CONTACT: Angela Mazzullo, Offshore Minerals Management (OMM) Budget Office at (703) 787–1691.

SUPPLEMENTARY INFORMATION: The rule published August 25, 2005, requires MMS to develop additional procedures that MMS will provide to the oil and gas industry in the form of a Notice to Lessees. The primary office responsible for developing those procedures, the MMS Gulf of Mexico Regional Office in New Orleans, Louisiana, has been closed since Hurricane Katrina and the flooding that followed that disaster. Moreover, many of the lessees and operators subject to the rule are similarly engaged in the restoration of normal operations following Hurricane Katrina. Lessees and operators will be making changes in their own procedures to comply with the rule. Lessees and operators whose operations have been interrupted as a result of the hurricane may not be able to make these changes until normal operations resume. Accordingly, the Department of the Interior is postponing the effective date of the final rule until January 1, 2006.

Dated: September 20, 2005.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 05–19223 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1, 2, 3, 5, and 10

[Docket No.: 2005–P–053]

RIN 0651–AB85

Provisions for Claiming the Benefit of a Provisional Application With a Non-English Specification and Other Miscellaneous Matters

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office) is amending the rules of practice to require that: A copy of the English translation of a foreign-language provisional application be filed in the provisional application if a nonprovisional application claims the benefit of the provisional application; a copy of documentary evidence supporting a claim of ownership be recorded in the Office's assignment records when an assignee takes action in a patent matter; and separate copies of a document be submitted to the Office for recording in the Office's assignment records, each accompanied by a cover sheet, if the document to be recorded includes an interest in, or a transaction involving, both patents and trademarks.

DATES: *Effective* November 25, 2005.

Applicability Date: The changes apply to any paper, application or reexamination proceeding filed in the Office on or after November 25, 2005. Further, if a nonprovisional patent application claims the benefit of the filing date of a non-English provisional application, a translation of the provisional application and a statement that the translation was accurate required by 37 CFR 1.78(a)(5)(iv) will not be required to be filed in the provisional application, if the translation and statement were filed in the nonprovisional application before November 25, 2005.

FOR FURTHER INFORMATION CONTACT: Karin Ferriter (571–272–7744), Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, or Robert J. Spar (571–272–7700), Director of the Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, directly by phone, or by facsimile to 571–273–7744, or by mail addressed to: Mail Stop Comments—Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450.

SUPPLEMENTARY INFORMATION: This final rule revises the rules of practice in title 37 of the Code of Federal Regulations (CFR) pertaining to records related to signature, availability of patent application files, power of attorney, provisional applications, and assignments.

Discussion of Specific Rules

Section 1.4: Section 1.4(d)(2) is amended to delete ''with a signature in permanent dark ink or its equivalent,'' because dark ink applies to handwritten signatures, not S-signatures. Section 1.4(d)(2)(ii) is amended to move the word ''only'' in the second sentence thereof from immediately preceding the word ''be'' to immediately following the word ''used'' and to change ''registered practitioner'' to ''patent practitioner (§ 1.32(a)(1)).'' The term ''patent practitioner'' is defined in § 1.32(a).

Section 1.11: Section 1.11(a) is amended for clarity and to reflect the policy regarding availability to the public of papers in the files of applications that have been published. For example, § 1.11(a) is amended to remove ''abandoned'' before ''published application.'' Published applications are not physically available to the public to copy and inspect if the file is maintained in a paper file wrapper. If a published application is not maintained in paper, but is instead maintained in the image file wrapper (IFW) system, the application is made available for public inspection through the Patent Application Information Retrieval (PAIR) system pursuant to § 1.14(a)(1)(iii) and 1.14(b). Since most

pending applications have become available through PAIR, the reference to only abandoned published applications in § 1.11 may have been misleading. In addition, § 1.11(a) is amended to include: ''If an application was published in redacted form pursuant to § 1.217, the complete file wrapper and contents of the patent application will not be available if: the requirements of paragraphs (d)(1), (d)(2), and (d)(3) of § 1.217 have been met in the application; and the application is still pending.''

Section 1.17: Section 1.17(f) is amended to add ''§ 1.36(a)—for revocation of a power of attorney by fewer than all of the applicants.'' See the discussion of the change to § 1.36(a). This change corrects § 1.17 by including § 1.36(a) in the list of petitions for which a fee set forth in § 1.17 can be charged, and also groups the fee for a petition under § 1.36(a) with similar petitions (under § 1.182 and § 1.183).

Section 1.25: Section 1.25(c)(4) is amended to change the address for payment to replenish a deposit account submitted by mail with a private delivery service or hand-carrying the payment to: Director of the U.S. Patent and Trademark Office, Attn: Deposit Accounts, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

Section 1.31: Section 1.31 is amended to change the title to ''Applicant may be represented by one or more patent practitioners or joint inventors'' in order to make the title of the rule more descriptive of the revised rule. A definition for ''patent practitioner'' is added to § 1.32(a), as discussed below, and the term ''patent practitioner'' is used in place of ''registered patent attorney or agent'' in § 1.31, and in other rules. Further, § 1.31 is amended to indicate that one or more patent practitioners or joint inventors may be given a power of attorney to thereby recognize that there may be a single person appointed or an appointment of more than one practitioner or joint inventor to represent the applicant. Section 1.32(c)(1) permits one or more joint inventors to be given power of attorney to represent the other joint inventor or inventors; accordingly, the revision to § 1.31 is necessary for consistency with § 1.32(c)(1).

Section 1.32: Section 1.32(a)(1) is amended to set forth the definition of ''patent practitioner'' and to renumber sections (a)(1) to (a)(4) as (a)(2) through (a)(5), respectively.

Revised § 1.32(a)(1) defines the term ''patent practitioner'' as ''a registered patent attorney or registered patent agent under § 11.6.''

Section 1.32(a)(1) is renumbered as § 1.32(a)(2) and further revised to change ''registered patent attorneys or registered patent agents'' to ''one or more patent practitioners or joint inventors'' to reflect that one or more patent practitioner(s) may be appointed in a power of attorney. Section 1.31 permits a power of attorney to be given to one or more patent practitioners or joint inventors, and this change is consistent therewith.

Section 1.32(a)(2) is renumbered as § 1.32(a)(3) and further revised to add ''or, in a reexamination proceeding, the assignee of the entirety of ownership of a patent'' to reflect that the assignee of the entire interest in a patent may authorize a patent practitioner to represent the assignee in reexamination proceedings, for example, in addition to patent applications. In addition, § 1.32(a)(3) is amended to change ''registered patent attorney or registered patent agent'' to ''patent practitioners or joint inventors.''

Any power of attorney given to a practitioner who has been suspended or disbarred by the Office is ineffective, and does not authorize the person to practice before the Office or to represent applicants or patentees in patent matters.

Section 1.32(a)(3) is renumbered as § 1.32(a)(4), and further revised to change ''registered patent attorney or registered patent agent'' to ''patent practitioner or joint inventor.''

Section 1.32(a)(4) is renumbered as § 1.32(a)(5), and the resulting new paragraph § 1.32(a)(5)(i) is amended to change both instances of ''patent application or patent'' to ''patent application, patent or other patent proceeding'' and the resulting new paragraph § 1.32(a)(5)(iii) is amended to delete ''registered.''

Section 1.32(c)(3) is amended such that the first sentence reads: ''Ten or fewer patent practitioners, stating the name and registration number of each patent practitioner.'' The Office needs the registration number of the patent practitioner to make the practitioner of record. Because the former rules did not require a registration number, registration numbers were sometimes omitted, leading to delays in Office processing of powers of attorney. Accordingly, § 1.32(c)(3) is amended to add a requirement for the registration number of the patent practitioner to assist the Office in making the practitioner of record. If the name submitted on the power of attorney does not match the name associated with the registration number provided in the Office of Enrollment and Discipline records for patent practitioners, the person that the Office will recognize as being of record will be the person associated with the registration number provided, because the Office enters the registration number, not the name, when making the practitioner of record. Accordingly, if the wrong registration number is provided, a new power of attorney will be required to correct the error.

Section 1.33: Section 1.33(a) is amended to use the generic term ''patent practitioner'' instead of ''registered patent attorney or patent agent.'' Specifically, § 1.33(a) is amended to change ''registered patent attorney or patent agent'' to ''patent practitioner'' in two places. In addition, § 1.33(a) is amended to revise the sixth sentence to read: ''If more than one correspondence address is specified in a single document, the Office will select one of the specified addresses for use as the correspondence address and, if given, will select the address associated with a Customer Number over a typed correspondence address.'' Furthermore, § 1.33(a)(1) is amended to change ''If the application was filed by a registered attorney or agent, any other registered practitioner named in the transmittal papers may also change the correspondence address'' to ''If the application was filed by a patent practitioner, any other patent practitioner named in the transmittal papers may also change the correspondence address.''

Neither § 1.33 nor any other rule authorize a practitioner who has been suspended or disbarred by the Office to practice before the Office.

Section 1.33(b)(1) and § 1.33(b)(2) are revised to change ''registered patent attorney or patent agent'' to ''patent practitioner.''

Section 1.33 is also revised to add new paragraph (e) to remind patent practitioners that the attorney roster must be updated separately from and in addition to any change of address filed in individual patent applications. Section 1.33 is amended to state: ''(e) A change of address filed in a patent application or patent does not change the address for a patent practitioner in the roster of patent attorneys and agents. See § 11.11 of this part.''

Section 1.34: Section 1.34 is amended to change ''registered patent attorney or patent agent'' to ''patent practitioner'' in two places, to change ''in whose behalf'' to ''on whose behalf,'' and to change ''must specify his or her registration number and name with his or her signature'' to ''must set forth his or her registration number, his or her name, and signature'' in order to clarify that

the name and signature are separate requirements.

Section 1.36: Section 1.36(a) is amended to change § 1.17(h) to § 1.17(f). The fee for a petition to allow a split power of attorney should be the same regardless of whether the split power of attorney results from revocation by fewer than all of the inventors, as provided in § 1.36(a), or from a petition under § 1.183 to waive the provisions of § 1.32(b)(4) requiring that a power of attorney be signed by the applicant for patent (§ 1.41(b)) or the assignee of the entire interest of the applicant. Furthermore, ''only'' has been moved from immediately preceding the word ''revoke'' to immediately following the term ''power of attorney'' and ''registered patent attorney or patent agent'' is changed to ''patent practitioner.'' Section 402.01 of the *Manual of Patent Examining Procedure* (MPEP) provides additional information on a split power of attorney. *See* MPEP § 402.01 (8th ed. 2001) (Rev. 3, August 2005).

Section 1.52: Section 1.52 is amended by removing paragraphs (a)(5), (a)(7), and (b)(7), and by redesignating paragraph (a)(6) as paragraph (a)(5). The removed paragraphs explained the practice set forth in § 1.135(c) wherein the Office will give applicant a new period of time to file a reply, if the initial reply was not complete or compliance with a requirement was inadvertently omitted. The paragraphs have been removed as unnecessary in view of § 1.135(c).

Section 1.78: Section 1.78(a)(5)(iv) is amended to require the English translation of a foreign-language provisional application be filed in the provisional application, instead of also permitting the translation to be filed in each nonprovisional application that claims the benefit of the filing date of the provisional application. Section 1.78(a)(5)(iv) is also amended to provide that applicant must file, in a nonprovisional application, confirmation of the filing of the translation and statement, when a notice is mailed in the nonprovisional application requiring the translation and statement. Previously, § 1.78(a)(5)(iv) provided that when, pursuant to 35 U.S.C. 119(e), benefit was being claimed of a provisional application which was filed in a language other than English, an English language translation of the provisional application, accompanied by a statement that the translation is accurate, must have been filed in either: (1) The provisional application; or (2) each nonprovisional application that claims the benefit of the provisional application. Thus, if the translation and statement were not filed in the provisional application, they could have been filed in each application that claims the benefit of the filing date of the provisional application (to satisfy the requirement of the rule).

A provisional application is open to the public if the benefit of the provisional application is claimed in an application that has either been published or patented. Where the translation and statement were not filed in the provisional application because they were filed in each nonprovisional application(s) claiming the benefit of the provisional application, there was a burden on the public in finding the translation and statement, and on the Office in storing possibly duplicate copies of the documents. Further, when a translation of the provisional application was filed in the nonprovisional application, the Office sometimes confused the translation of the provisional with the specification papers to be used for the nonprovisional application. Because the option was available to file the translation and statement in the nonprovisional application, applicant's counsel may have inadvertently chosen that option in situations where there were many nonprovisional applications claiming the benefit of a single provisional application, and incurred substantial expense for having to file a translation in each nonprovisional application. Having only one copy of the translation (and statement) ''centrally'' filed in the provisional application, regardless of how many nonprovisional applications claim benefit of that provisional application will be beneficial for applicants, the public, and the Office. Accordingly, § 1.78(a)(5)(iv) is amended to delete from the first sentence ''or the later-filed nonprovisional application'' to thereby eliminate the option to file the translation and statement in the nonprovisional application.

Section 1.78(a)(5)(iv) is further revised to add '', in the provisional application,'' after ''a period of time within which to file'' and the former last sentence of § 1.78(a)(5)(iv) is further revised to read: ''If the notice is mailed in a pending nonprovisional application, a timely reply to such a notice must include the filing in the nonprovisional application of either a confirmation that the translation and statement were filed in the provisional application, or an amendment or Supplemental Application Data Sheet withdrawing the benefit claim, or the nonprovisional application will be abandoned.'' Lastly, the following sentence is added to the end of the paragraph: ''The translation and statement may be filed in the provisional application, even if the provisional application has become abandoned.''

Section 1.133: Section 1.133(a)(2) is amended to permit an interview before first Office action in any application if the examiner determines that such an interview would advance prosecution of the application. The Office conducted a pilot program permitting an interview before the first Office action in applications that were classified in class 705, subclasses 35 through 45, and assigned to Technology Center Art Units 3624 or 3628. *See Notice of Pilot Program to Permit Pre-First Office Action Interview for Applications Assigned to Art Units 3624 and 3628 and Request for Comments on Pilot Programs*, 1281 *Off. Gaz. Pat. Office* 148 (Apr. 27, 2004). The Office received few requests for such interviews, but when such interviews were conducted, the feedback from examiners was that such interviews were usually beneficial and often assisted in focusing the issues for examination. Therefore, the Office sees no justification for maintaining the current prohibition in § 1.133 on interviews before first Office action in non-continuing applications. Nevertheless, an interview before the first Office action in a non-continuing application will not be permitted unless the examiner determines that such an interview would advance prosecution of the application. Thus, the examiner may require that an applicant requesting an interview before first Office action provide a paper that includes a general statement of the state of the art at the time of the invention, and an identification of no more than three (3) references believed to be the ''closest'' prior art and an explanation as to how the broadest claim distinguishes over such references. *See Notice of Pilot Program to Permit Pre-First Office Action Interview for Applications Assigned to Art Units 3624 and 3628 and Request for Comments on Pilot Programs*, 1281 *Off. Gaz. Pat. Office* at 149.

Section 2.208: Section 2.208(c)(4) is amended to change the address for payment to replenish a deposit account submitted by mail with a private delivery service or hand-carrying the payment to: Director of the U.S. Patent and Trademark Office, Attn: Deposit Accounts, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

Section 3.28: Section 3.28 previously directed that ''[o]nly one set of documents and cover sheets to be recorded should be filed'' which discouraged assignees from submitting one set of documents including a patent

cover sheet and the document to be recorded, and another set of documents including a trademark cover sheet and another copy of the document to be recorded. While the Office could process a set of documents that includes a patent cover sheet, trademark cover sheet, and only one copy of the document to be recorded, submitting only one copy of the document could have led to the misconception by the Office that a document submitted for recordation has been omitted, or the document submitted belongs only to the second cover sheet, particularly when the documents are submitted by facsimile and there is a break in the transmission. For example, if a submission included: A trademark sheet on pages 1 and 2, a patent cover sheet on page 3, and a document for recording on pages 4–7, then, if pages 1 and 2 are separated from the remainder of the set of documents, it may not have been clear that the trademark cover sheet was missing because the patent cover sheet and the document to be recorded would have themselves made a complete set of documents. To reduce confusion, § 3.28 is revised to require that a separate copy of the document to be recorded be submitted with each cover sheet. Note that even if the term ''copy of the document to be recorded'' is not used in this discussion, the document submitted for recordation must be a copy, and not the original document, and the term ''document to be recorded'' has been used to emphasize that the document is to be recorded, not to suggest that an original may be submitted.

Section 3.28 is amended to state that each document to be recorded must be accompanied by a single cover sheet (and not multiple cover sheets), to put parentheses around ''as specified in § 3.31,'' and to delete the statement that at least one cover sheet must be included with each document submitted for recording. Section 3.28 is also revised to delete the sentence which states that only one set of documents and cover sheets to be recorded must be filed, and to make it clear that if an assignment includes interests in, or transactions involving, both patents and trademarks, then two copies of each document (each document with its own cover sheet) must be submitted. Thus, a patent cover sheet and a copy of the document, and a trademark cover sheet and a copy of the document, must be submitted.

Section 3.31: Section 3.31(a)(7) is amended to delete ''submission'' before ''(*e.g.* /Thomas O'Malley III/)'' to correct an obvious error.

Section 3.73: Section 3.73(b)(1)(i) is amended to require, for patent matters, that the document(s) submitted to establish ownership under § 3.73(b) be recorded pursuant to § 3.11 in the assignment records.

In order to take action in a patent application or a patent, a party must comply with § 3.73 to establish ownership of the rights to a patent application or a patent (*i.e.*, a patent property) by submitting to the Office a signed statement identifying the assignee. In the prior version of the rule, the signed statement must have been accompanied by either: (1) Documentary evidence of a chain of title from the original owner to the assignee; or (2) a statement specifying where such documentary evidence is recorded in the Office's assignment records. Previously, where the first option was chosen, there was no requirement that the document(s) submitted to establish ownership also be recorded pursuant to § 3.11 in the assignment records unless the Office explicitly required such recordation on a case-by-case basis. Such a requirement was made only in the rare situation where a question arose as to ownership of the property. It is desirable, however, that the Office's patent assignment records should, as a rule, reflect the assignment of any assignee seeking to take action in a patent application or patent.

The previous system, which permitted an assignee to take action by submitting a copy of the assignment in a patent application or patent, but did not require the assignment to be recorded in the Office's patent assignment records, made a search of the Office's patent assignment records unreliable. Permitting an assignee to take action in an application or patent without also recording the assignment (in the Office's assignment records) also encourages the late filing of assignment document(s) and defeats the benefits of timely recordation. *See* 35 U.S.C. 261. (''An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.'')

Section 3.73(b)(1)(i) is amended to require that, for patent matters only, the submission of the documentary evidence to establish ownership must be accompanied by a statement affirming that the documentary evidence of the chain of title from the original owner to the assignee was, or concurrently is, submitted for recordation pursuant to § 3.11. Thus, when filing a § 3.73(b) statement to establish ownership, an applicant or patent owner must also submit the assignment document(s) to the Office for recordation, if such a submission has not been previously made. If the § 3.73(b) statement is not accompanied by a statement affirming that the documentary evidence was, or concurrently is, submitted for recordation pursuant to § 3.11, then the § 3.73(b) statement will not be accepted, and the assignee(s) will not have established the right to take action in the patent application or the patent for which the § 3.73(b) statement was submitted. For trademark matters, there would continue to be no requirement that the submission of the documentary evidence be accompanied by a statement affirming that the documentary evidence was submitted for recordation. Rather, paragraph (b)(1)(i) would continue to set forth that the Office may require (as deemed appropriate in any individual case) the documents (submitted to establish ownership) to be recorded pursuant to § 3.11 in the assignment records of the Office as a condition to permitting the assignee to take action in a trademark matter pending before the Office.

Section 5.11: Section 5.11 is amended to correct cross references. Section 5.11(b) is amended to change ''15 CFR part 779'' to ''15 CFR part 734'' and ''Office of Export Administration, International Trade Administration'' to ''Bureau of Industry and Security.'' Section 5.11(c) is amended to change ''data * * * is'' to ''data * * * are,'' ''15 CFR parts 768–799'' to ''15 CFR parts 730–774,'' ''Export Administration'' to ''Bureau of Industry and Security,'' and ''15 CFR part 779'' to ''15 CFR part 734.''

Section 5.19: Section 5.19 is amended to correct two cross references, and to update a reference to the Office. Section 5.19(a) is amended to change ''15 CFR 770.10(j)'' to ''15 CFR 734.3(b)(1)(v)'' and to add ''U.S.'' before ''Patent.'' Section 5.19(b) is amended to change ''15 CFR 779A.3(e)'' to ''15 CFR 734.10(a).''

Section 10.112: Section 10.112 is amended to correct the cross reference, changing ''10.6(c)'' to ''11.6(c).''

Response to comments: The Office published a notice proposing changes to the rules of practice to: Allow a person acting with limited recognition to be given a power of attorney and authorization to sign amendments and other patent-related correspondence; require a copy of the English translation of a foreign-language provisional application be filed in the provisional application if a nonprovisional application claims the benefit of the provisional application; and require a copy of documentary evidence

supporting a claim of ownership be recorded in the Office's assignment records when an assignee takes action in a patent matter. *See Provisions for Persons Granted Limited Recognition To Prosecute Patent Applications and Other Miscellaneous Matters*, 70 FR 17629 (April 7, 2005), 1294 *Off. Gaz. Pat. Office* 22 (May 3, 2005) (proposed rule). The Office received 11 written comments in response to this notice. Comments generally in support of a change are not discussed. Comments regarding limited recognition, other than comment 2, are not discussed. The other comments and the Office's responses to those comments follow:

Comment 1: One comment addressed the proposed changes to § 1.11, noting that the change ''solidified a position held by the Patent Office in recent years that the act of publication at 18 months constitutes an inherent power to inspect.'' The comment raised a concern that having the inventor's signature available on the internet could assist someone in identity theft, and also questioned the Office's authority to make the file wrapper public.

Response: In requiring publication of patent applications, Congress gave the Office the authority to determine how to publish patent applications. The Office has exercised this authority by publishing the specification, including the claims, in a searchable database, and by making the published application file available to the public, either on the internet, or through the Office of Public Records, or the File Information Unit, depending upon whether the file is available in image or paper form, and depending upon the status of the application (pending or abandoned). As to identity theft, the Office does not require Social Security Numbers, and takes steps to ensure that credit card information is not made part of a patent application file. Where an applicant elects to file a Petition to Make Special because of the age of the applicant, if the applicant uses a copy of his or her driver's license to support the petition, the Office will expunge the document from the images available to the public, if a petition under § 1.59 is filed. The signature of the inventor on the oath or declaration for the patent application is required by 35 U.S.C. 116. The Office has always provided full access to the public to patented files so that the public can evaluate whether the statutory requirements (such as an oath or declaration required by 35 U.S.C. 116) were met, and to understand the prosecution history.

Comment 2: One comment asked whether the proposed amendments would make private PAIR available to patent practitioners with limited recognition, *i.e.*, whether someone with a limited recognition could be associated with a Customer Number.

Response: Assignment of a limited recognition number would permit someone accorded limited recognition to have his or her limited recognition number associated with a Customer Number, and obtain a Public Key Infrastructure (PKI) certificate so as to obtain access to private PAIR. For further information on private PAIR, contact the Electronic Business Center by telephone at 866–217–9197 (toll free) or by e-mail to *EBC@uspto.gov*. The Office has decided not to go forward with the proposed amendments regarding limited recognition at this time.

Comment 3: One comment questions the statutory basis for the Office to require a translation of a foreign-language provisional application before the provisional application can be relied upon in a benefit claim. The comment suggests adding the following sentence to the beginning of § 1.78(a)(5)(iv): ''Benefit to a provisional application may not be granted in any nonprovisional application or any international application designating the United States of America unless the provisional application is in English or an English-language translation is provided with a certification of the accuracy of the translation.''

Response: The Office's authority to require an English translation is provided in 35 U.S.C. 2(b)(2)(A) (35 U.S.C. 6(a) at the time an English translation of a provisional application was originally added to the rules of practice). An English translation is a procedural requirement. As to the proposed insertion, the suggestion has not been adopted.

Comment 4: One comment suggested that there not be a requirement for an applicant to file a statement in each nonprovisional application that an English language translation was filed in the provisional application, and suggested that a notice be mailed in a nonprovisional application near 14 months from the provisional application's filing date, if the English translation has not been filed in the provisional application.

Response: The statement is required to be filed only when a notice has been mailed in the nonprovisional application requiring an English translation of the provisional application so that the examiner can evaluate the benefit claim. If a provisional application is filed in a language other than English, and an English language translation is later filed in the provisional application at the same time a nonprovisional application is filed that claims the benefit of the provisional application, then no statement that an English language translation was filed will be necessary. At the time the examiner evaluates the benefit claim, the English language translation will be in the provisional application and available to the examiner. Furthermore, if a provisional application was filed in a language other than English, an applicant filing a nonprovisional application claiming the benefit of the filing date of the provisional application could have filed the translation of the provisional application in the nonprovisional application or the provisional application according to § 1.78(a)(5) before the effective date of the revision to § 1.78(a)(5).

If the translation was elected to be filed in the nonprovisional application, according to prior § 1.78(a)(5), a continuation, continuation-in-part or divisional application of the nonprovisional application would either need a new English translation of the provisional application to be filed in the continuation, continuation-in-part or divisional application, or the translation to be filed in the provisional application. As revised, the translation of the non-English specification must always be filed in the provisional application, and a notice will be mailed in the nonprovisional application only where the translation and the statement that the translation is accurate were not filed in the provisional application.

As to the suggestion that the notice requiring the English language translation be mailed in the nonprovisional application 14 months after the provisional application was filed, the Office is seeking to continually improve processing of patent applications, and generally seeks to send out notices in a timely manner, with as many issues addressed at one time as possible. Applicants should be alert to the language of the provisional application and may be well advised to docket provisional applications in such a manner so that any necessary translation can be filed without a reminder from the Office.

Comment 5: Another comment suggested that the need for a translation to be filed in a provisional application is an undue burden on the applicant, and suggested a public hearing before this change is made.

Response: A translation is already required to be filed whenever an applicant claims the benefit of an application that was not filed in English and the applicant is notified of the need

for the translation by the Office. The change made in the amendment to § 1.78 merely requires that the translation be filed in the provisional application, rather than in either the provisional or each nonprovisional application claiming the benefit of the provisional application. The Office has found that the translation of the provisional application has been confused with the specification for the application to be examined and minimizing this confusion should be beneficial for both applicants and the Office. In more than one instance, the Office has published the translation of the provisional patent application instead of a nonprovisional application for patent, and has been required to publish a corrected patent application publication to correct this error. Accordingly, requiring the translation of the provisional application to be filed in the provisional application is not an undue burden.

Comment 6: Another comment stated that § 1.78(a)(5)(iv) did not clearly confirm that the translation and statement could be filed in the provisional application both before and after abandonment of that application. A related comment argued that allowing papers to be filed in an abandoned provisional application was inconsistent with § 1.137(g), which provides for abandonment of provisional applications in limited situations.

Response: The translation and statement can be filed in a provisional application after the provisional application becomes abandoned. Nothing in prior § 1.78 precluded the translation from being filed in an abandoned provisional application. Many papers are filed in abandoned applications: Changes of address, powers of attorney, and powers to inspect. A sentence has been added to the rule to clarify this point. In permitting a paper to be placed in the file of an abandoned application, nothing suggests that the application has been revived. As to correcting a defective translation in an abandoned application, an applicant should simply file the corrected translation in the abandoned application.

Comment 7: One comment suggested that applicants be required to file a translation of a provisional application in the corresponding nonprovisional application after the filing date of the nonprovisional application to avoid confusing the specification to be examined with the translation.

Response: The option of having the translation filed after the filing date of the nonprovisional application does not avoid the likelihood of the translation being confused with a substitute specification, and has not been adopted.

Comment 8: One comment suggested that the notice requiring the translation and statement that the is accurate be mailed in the provisional application about fourteen months after the provisional application was filed, instead of being mailed in the nonprovisional application.

Response: The suggestion has not been adopted because, if the notice were to be mailed in the abandoned provisional application, the only consequence of a failure to comply would be waiver of right to make a claim of the benefit of the provisional application. More than one application may claim the benefit of the provisional application, and a translation may have already been filed in some of the nonprovisional applications. If the notice is mailed when a new application is filed that claims the benefit of the provisional application, and applicant failed to comply, having the benefit claim waived only as to the new application would be overly complicated. See also the discussion of comment 9.

Comment 9: Two comments suggested that the rule should provide that the benefit claim be waived if the translation has not been filed in response to a notice requiring the translation to be filed in the provisional application, and confirmation in the nonprovisional application. Alternatively, the comments suggested that applicant be allowed to withdraw the claim of the benefit of the provisional application.

Response: The suggestion that the benefit claim be considered waived if no response is filed to the notice has not been adopted. The analogy to a priority or benefit claim being waived when not made in a timely manner is not persuasive because, with a late benefit claim, no mention is made of the earlier application until the right to make a benefit claim has been waived. With the failure to file a translation, the right exists, but would be extinguished by the failure to timely file the translation if the suggestion were to be adopted. The sudden extinguishing of a right to make a benefit claim could have an impact upon the prior art applied by the examiner, and is better addressed as part of the standard procedures for failure to comply with the requirement of the Office. The Office also considered treating the benefit claim as waived if the translation is not filed by the time of publication or patenting of the application, which would be more analogous to the late benefit claims treatment, but the Office generally prefers to warn applicants of an impending loss of rights when feasible. If applicant desires to eliminate the benefit claim, an amendment to the first sentence of the specification or a supplemental application data sheet to remove the benefit claim should be filed promptly in response to the notice. If the Office were to wait for applicant's reply, the Office would be delaying prosecution unnecessarily, and the impact on patent term adjustment would be unclear.

As to the suggestion that the rule provide for the express withdrawal of a benefit claim instead of filing a translation, this suggestion has been adopted by adding ''or an amendment or Supplemental Application Data Sheet withdrawing the benefit claim'' to § 1.78(a)(5)(iv).

Comment 10: One comment requested clarification of the result of the Office failing to mail a notice requiring an English translation of a provisional application, and to comment on the position taken in a prior rule making that the applicant should file an English translation and statement that the translation is accurate before an application claiming the benefit of the nonprovisional application is published.

Response: The consequence of an applicant who has filed a provisional application in a language other than English, failed to file a translation of the provisional application and a statement that the translation is accurate, and then filed an application claiming the benefit of the provisional application is that the applicant has engaged in conduct that leads the Office to expend resources mailing the applicant a letter requiring the translation. If the examiner of a nonprovisional application needed the translation to determine whether the application was entitled to the benefit of the provisional application, then another consequence would be a delay in the prosecution of the nonprovisional application. Applicants are encouraged to file any necessary translations in a timely manner so as to avoid the need for the Office to expend resources reminding applicant to file papers and fees that were previously omitted, preferably before publication of the nonprovisional application so that the appropriate date under 35 U.S.C. 102(e) can be determined without an independent translation of the provisional application.

Comment 11: One comment alleged that the text ''given a period of time within which to file'' was vague and indefinite, and requested that a fixed period be set in the rule. The comment stated that sometimes an insufficient

period of time may be set for an applicant to obtain the translation.

Response: The suggestion has not been adopted. When an applicant elects to claim the benefit of a non-English provisional application in a nonprovisional application (or by entry into the national stage), applicant should initiate the translation of the provisional application because § 1.78(a)(5)(iv) requires a translation (and a statement that the translation is accurate) when the benefit claim of a provisional is claimed. Applicants should not wait until reminded by the Office of this requirement, and should obtain and file the translation without being required by the Office to do so. If the requirement is made before examination, a period of no less than thirty days will be set. If the requirement is made by the examiner, as part of an Office action, the period of time will be the time dictated by the other issues addressed in the Office action (*i.e.*, an *Ex parte Quayle* action would be two months and a non-final Office action would be three months). The broad language used in the rule is desirable to maximize the Office's flexibility in setting the period for reply.

Comment 12: One comment requested that the proposed revision to § 1.78 apply only to provisional applications filed on or after the effective date of the rule change.

Response: Applicants have been required to file a translation of a non-English provisional application since provisional applications were first accepted. The change in § 1.78 is merely to indicate the application in which a translation is required. When the rule becomes effective, if a nonprovisional application claims the benefit of a non-English provisional and a copy of the translation is not already in the nonprovisional application or the provisional application, then the translation will be required to be filed in the provisional application.

Comment 13: One comment suggested that the rules be amended to provide for paralegals to prepare and file Information Disclosure Statements and responses to Notices To File Missing Parts.

Response: The rules of practice provide that only a patent practitioner, the applicant or the assignee of the entire interest of the applicant may sign correspondence in a patent application. Requests for corrected filing receipts, Information Disclosure Statements and responses to Notices To File Missing Parts are examples of correspondence that must comply with the signature rules. No change is being considered at this time.

Furthermore, paralegals or other non-registered personnel employed by the registered patent practitioner should not contact the Office to ask legal questions or other questions regarding the merits of a patent application. As paralegals and other personnel are not registered practitioners, only general information about Office procedures can be provided. Only registered practitioners are permitted to prosecute patent applications in accordance with § 11.10. Thus, Office personnel have been instructed to discuss the merits of a patent application with only the patent practitioner of record, the applicant, or the assignee of the entire interest of the applicant. *See* MPEP §§ 101 and 102.

Comment 14: Another comment suggested that the proposed amendment to § 3.73(b)(1)(i) be rephrased to clearly provide that the documentary evidence of assignment may be submitted concurrently with, as well as prior to, submission of a statement under § 3.73(b).

Response: This suggestion is adopted.

Rule Making Considerations

Administrative Procedure Act: The notable changes in this final rule concern: (1) Providing the proper S-signature by someone acting with limited recognition pursuant to § 11.9(a) and § 11.9(b); (2) providing that the petition fee for a split power of attorney resulting from revocation of the power of attorney by fewer than all of the applicants, or assignees of the applicants, be the same as the petition fee to waive the rules to appoint a split power of attorney initially; (3) requiring that the translation of a non-English language provisional application and statement that the translation is accurate be filed in a provisional application, rather than in either the nonprovisional application claiming the benefit of the provisional application or the provisional application; and (4) requiring that the evidentiary evidence of ownership be recorded under 37 CFR part 3 when an assignee takes action in a patent application. Therefore, these rule changes (except for the change to the petition fee for revocation of a power of attorney by fewer than all of the applicants) involve interpretive rules, or rules of agency practice and procedure under 5 U.S.C. 553(b)(A). *See Bachow Commc'n Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (rules governing an application process are ''rules of agency organization, procedure, or practice'' and are exempt from the Administrative Procedure Act's notice and comment requirement); *see also Merck & Co., Inc.* v. *Kessler,* 80 F.3d 1543, 1549–50, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (the rules of practice promulgated under the authority of former 35 U.S.C. 6(a) (now in 35 U.S.C. 2(b)(2)) are not substantive rules to which the notice and comment requirements of the Administrative Procedure Act apply), and *Fressola* v. *Manbeck,* 36 USPQ2d 1211, 1215 (D.D.C. 1995) (''it is extremely doubtful whether any of the rules formulated to govern patent and trade-mark practice are other than 'interpretive rules, general statements of policy, * * * procedure, or practice.' '') (quoting C.W. Ooms, *The United States Patent Office and the Administrative Procedure Act,* 38 Trademark Rep. 149, 153 (1948)).

Regulatory Flexibility Act: As prior notice and an opportunity for public comment were not required pursuant to 5 U.S.C. 553 (or any other law) for the changes proposed in this notice (except for the change to the petition fee for revocation of a power of attorney by fewer than all of the applicants), an initial or final regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required for the changes proposed in this notice (with the sole exception of the change to the petition fee for revocation of a power of attorney by fewer than all of the applicants). *See* 5 U.S.C. 603.

With respect to the petition fee change, the factual basis supporting the certification under the Regulatory Flexibility Act follows: This notice proposes to change the petition fee (from the $130.00 fee specified in § 1.17(h) to the $400.00 fee specified in § 1.17(f)) for a split power of attorney resulting from revocation of the power of attorney by fewer than all of the applicants or assignees of the applicants to be in line with the actual cost of treating such petitions (in view of the special handling required for the split power of attorney resulting from revocation of the power of attorney). This petition fee is established pursuant to the Office's authority under 35 U.S.C. 41(d) to establish fees for all processing, services, or materials relating to patents not otherwise specified in 35 U.S.C. 41 to recover the estimated average cost to the Office of such processing, services, or materials.

The Office received over 376,000 nonprovisional patent applications and over 102,000 provisional patent applications in fiscal year 2004. The Office receives fewer than five petitions for revocation of the power of attorney by fewer than all of the applicants or assignees of the applicants each year. While the Office does not track the entity status of such petitions, the small entity patent application filing rate is

about 31.0%. Thus, even if all of the affected patents were by a small entity, the proposed change would impact relatively few patent applications (0.0013% of all nonprovisional patent applications).

Accordingly, for the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes proposed in this notice will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

Executive Order 13132: This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act: This notice involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The collection of information involved in this notice has been reviewed and previously approved by OMB under OMB control numbers 0651–0012, 0651–0031, 0651–0032, 0651–0034, and 0651–0035. The United States Patent and Trademark Office is not resubmitting any information collection package to OMB for its review and approval because the changes in this notice do not affect the information collection requirements associated with the information collection under these OMB control numbers. The principal impacts of the changes proposed in this notice are: (1) Providing that the fee for a split power of attorney resulting from revocation of the power of attorney by fewer than all of the applicants or assignees of the applicants be the same as the fee to waive the rules to appoint a split power of attorney initially; (2) requiring that the translation of a non-English language provisional application and statement that the translation is accurate be filed in a provisional application, rather than in either the nonprovisional application claiming the benefit of the provisional application or the provisional application; and (3) requiring that the evidentiary evidence of ownership be recorded under 37 CFR part 3 when an assignee takes action in a patent application.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to Robert J. Spar, Director, Office of Patent Legal Administration, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313–1450, or to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of Information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

37 CFR Part 2

Administrative practice and procedure, Trademarks.

37 CFR Part 3

Administrative practice and procedure, Inventions and patents, Reporting and recordkeeping requirements.

37 CFR Part 5

Classified information, Exports, Foreign relations, Inventions and patents.

37 CFR Part 10

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 37 CFR Parts 1, 2, 3, 5, and 10 are amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2).

■ 2. Section 1.4 is amended by revising paragraph (d)(2) introductory text and paragraph (d)(2)(ii) to read as follows:

§ 1.4 Nature of correspondence and signature requirements.

* * * * *

(d) * * *

(2) *S-signature.* An S-signature is a signature inserted between forward slash marks, but not a handwritten signature as defined by § 1.4(d)(1). An S-signature includes any signature made by electronic or mechanical means, and any other mode of making or applying a signature not covered by either a handwritten signature of § 1.4(d)(1) or an Office Electronic Filing System (EFS) character coded signature of § 1.4(d)(3). Correspondence being filed in the Office in paper, by facsimile transmission as provided in § 1.6(d), or via the Office Electronic Filing System as an EFS Tag(ged) Image File Format (TIFF) attachment, for a patent application, patent, or a reexamination proceeding may be S-signature signed instead of being personally signed (*i.e.*, with a handwritten signature) as provided for in paragraph (d)(1) of this section. The requirements for an S-signature under this paragraph (d)(2) are as follows.

* * * * *

(ii) A patent practitioner (§ 1.32(a)(1)), signing pursuant to §§ 1.33(b)(1) or 1.33(b)(2), must supply his/her registration number either as part of the S-signature, or immediately below or adjacent to the S-signature. The number (#) character may be used only as part of the S-signature when appearing before a practitioner's registration number; otherwise the number character may not be used in an S-signature.

* * * * *

■ 3. Section 1.11 is amended by revising paragraph (a) to read as follows:

§ 1.11 Files open to the public.

(a) The specification, drawings, and all papers relating to the file of: A published application; a patent; or a statutory invention registration are open to inspection by the public, and copies may be obtained upon the payment of the fee set forth in § 1.19(b)(2). If an application was published in redacted form pursuant to § 1.217, the complete file wrapper and contents of the patent application will not be available if: The requirements of paragraphs (d)(1), (d)(2), and (d)(3) of § 1.217 have been met in the application; and the application is still pending. See § 2.27 of this title for trademark files.

* * * * *

■ 4. Section 1.17 is amended by revising paragraph (f) to read as follows:

§ 1.17 Patent application and reexamination processing fees.

* * * * *

(f) For filing a petition under one of the following sections which refers to this paragraph: $400.00.

§ 1.36(a)—for revocation of a power of attorney by fewer than all of the applicants.

§ 1.53(e)—to accord a filing date.

§ 1.57(a)—to accord a filing date.

§ 1.182—for decision on a question not specifically provided for.

§ 1.183—to suspend the rules.

§ 1.378(e)—for reconsideration of decision on petition refusing to accept delayed payment of maintenance fee in an expired patent.

§ 1.741(b)—to accord a filing date to an application under § 1.740 for extension of a patent term.

* * * * *

■ 5. Section 1.25 is amended by revising paragraph (c)(4) to read as follows:

§ 1.25 Deposit accounts.

* * * * *

(c) * * *

(4) A payment to replenish a deposit account may be submitted by mail with a private delivery service or by hand-carrying the payment to: Director of the U.S. Patent and Trademark Office, Attn: Deposit Accounts, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

* * * * *

■ 6. Section 1.31 is revised to read as follows:

§ 1.31 Applicant may be represented by one or more patent practitioners or joint inventors.

An applicant for patent may file and prosecute his or her own case, or he or she may give a power of attorney so as to be represented by one or more patent practitioners or joint inventors. The United States Patent and Trademark Office cannot aid in the selection of a patent practitioner.

■ 7. Section 1.32 is amended by revising paragraphs (a) and (c)(3) to read as follows:

§ 1.32 Power of attorney.

(a) *Definitions.* (1) *Patent practitioner* means a registered patent attorney or registered patent agent under § 11.6.

(2) *Power of attorney* means a written document by which a principal authorizes one or more patent practitioners or joint inventors to act on his or her behalf.

(3) *Principal* means either an applicant for patent (§ 1.41(b)) or an assignee of entire interest of the applicant for patent or in a reexamination proceeding, the assignee of the entirety of ownership of a patent. The principal executes a power of attorney designating one or more patent practitioners or joint inventors to act on his or her behalf.

(4) *Revocation* means the cancellation by the principal of the authority previously given to a patent practitioner or joint inventor to act on his or her behalf.

(5) *Customer Number* means a number that may be used to:

(i) Designate the correspondence address of a patent application or patent such that the correspondence address for the patent application, patent or other patent proceeding would be the address associated with the Customer Number;

(ii) Designate the fee address (§ 1.363) of a patent such that the fee address for the patent would be the address associated with the Customer Number; and

(iii) Submit a list of patent practitioners such that those patent practitioners associated with the Customer Number would have power of attorney.

* * * * *

(c) * * *

(3) Ten or fewer patent practitioners, stating the name and registration number of each patent practitioner. Except as provided in paragraph (c)(1) or (c)(2) of this section, the Office will not recognize more than ten patent practitioners as being of record in an application or patent. If a power of attorney names more than ten patent practitioners, such power of attorney must be accompanied by a separate paper indicating which ten patent practitioners named in the power of attorney are to be recognized by the Office as being of record in the application or patent to which the power of attorney is directed.

■ 8. Section 1.33 is amended by revising paragraphs (a) introductory text, (a)(1), (b)(1) and (b)(2) and by adding paragraph (e) to read as follows:

§ 1.33 Correspondence respecting patent applications, reexamination proceedings, and other proceedings.

(a) *Correspondence address and daytime telephone number.* When filing an application, a correspondence address must be set forth in either an application data sheet (§ 1.76), or elsewhere, in a clearly identifiable manner, in any paper submitted with an application filing. If no correspondence address is specified, the Office may treat the mailing address of the first named inventor (if provided, see §§ 1.76(b)(1) and 1.63(c)(2)) as the correspondence address. The Office will direct all notices, official letters, and other communications relating to the application to the correspondence address. The Office will not engage in double correspondence with an applicant and a patent practitioner, or with more than one patent practitioner except as deemed necessary by the Director. If more than one correspondence address is specified in a single document, the Office will select one of the specified addresses for use as the correspondence address and, if given, will select the address associated with a Customer Number over a typed correspondence address. For the party to whom correspondence is to be addressed, a daytime telephone number should be supplied in a clearly identifiable manner and may be changed by any party who may change the correspondence address. The correspondence address may be changed as follows:

(1) *Prior to filing of § 1.63 oath or declaration by any of the inventors.* If a § 1.63 oath or declaration has not been filed by any of the inventors, the correspondence address may be changed by the party who filed the application. If the application was filed by a patent practitioner, any other patent practitioner named in the transmittal papers may also change the correspondence address. Thus, the inventor(s), any patent practitioner named in the transmittal papers accompanying the original application, or a party that will be the assignee who filed the application, may change the correspondence address in that application under this paragraph.

* * * * *

(b) * * *

(1) A patent practitioner of record appointed in compliance with § 1.32(b);

(2) A patent practitioner not of record who acts in a representative capacity under the provisions of § 1.34;

* * * * *

(e) A change of address filed in a patent application or patent does not change the address for a patent practitioner in the roster of patent attorneys and agents. See § 11.11 of this title.

■ 9. Section 1.34 is revised to read as follows:

§ 1.34 Acting in a representative capacity.

When a patent practitioner acting in a representative capacity appears in person or signs a paper in practice before the United States Patent and Trademark Office in a patent case, his or her personal appearance or signature shall constitute a representation to the United States Patent and Trademark Office that under the provisions of this subchapter and the law, he or she is authorized to represent the particular party on whose behalf he or she acts. In filing such a paper, the patent

practitioner must set forth his or her registration number, his or her name and signature. Further proof of authority to act in a representative capacity may be required.

■ 10. Section 1.36 is amended by revising paragraph (a) to read as follows:

§ 1.36 Revocation of power of attorney; withdrawal of patent attorney or agent.

(a) A power of attorney, pursuant to § 1.32(b), may be revoked at any stage in the proceedings of a case by an applicant for patent (§ 1.41(b)) or an assignee of the entire interest of the applicant, or the owner of the entire interest of a patent. A power of attorney to the patent practitioners associated with a Customer Number will be treated as a request to revoke any powers of attorney previously given. Fewer than all of the applicants (or fewer than all of the assignees of the entire interest of the applicant or, in a reexamination proceeding, fewer than all the owners of the entire interest of a patent) may revoke the power of attorney only upon a showing of sufficient cause, and payment of the petition fee set forth in § 1.17(f). A patent practitioner will be notified of the revocation of the power of attorney. Where power of attorney is given to the patent practitioners associated with a Customer Number (§ 1.32(c)(2)), the practitioners so appointed will also be notified of the revocation of the power of attorney when the power of attorney to all of the practitioners associated with the Customer Number is revoked. The notice of revocation will be mailed to the correspondence address for the application (§ 1.33) in effect before the revocation. An assignment will not of itself operate as a revocation of a power previously given, but the assignee of the entire interest of the applicant may revoke previous powers of attorney and give another power of attorney of the assignee's own selection as provided in § 1.32(b).

* * * * *

§ 1.52 [Amended]

■ 11. Section 1.52 is amended by removing paragraphs (a)(5), (a)(7), and (b)(7), and by redesignating paragraph (a)(6) as paragraph (a)(5).

■ 12. Section 1.78 is amended by revising paragraph (a)(5)(iv) to read as follows:

§ 1.78 Claiming benefit of earlier filing date and cross-references to other applications.

(a) * * *

(5)(i) * * *

(iv) If the prior-filed provisional application was filed in a language other than English and both an English-language translation of the prior-filed provisional application and a statement that the translation is accurate were not previously filed in the prior-filed provisional application, applicant will be notified and given a period of time within which to file, in the prior-filed provisional application, the translation and the statement. If the notice is mailed in a pending nonprovisional application, a timely reply to such a notice must include the filing in the nonprovisional application of either a confirmation that the translation and statement were filed in the provisional application, or an amendment or Supplemental Application Data Sheet withdrawing the benefit claim, or the nonprovisional application will be abandoned. The translation and statement may be filed in the provisional application, even if the provisional application has become abandoned.

* * * * *

■ 13. Section 1.133 is amended by revising paragraph (a)(2) to read as follows:

§ 1.133 Interviews.

(a)(1) * * *

(2) An interview for the discussion of the patentability of a pending application will not occur before the first Office action, unless the application is a continuing or substitute application or the examiner determines that such an interview would advance prosecution of the application.

* * * * *

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 14. The authority citation for 37 CFR part 2 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 2(b)(2).

■ 15. Section 2.208 is amended by revising paragraph (c)(4) to read as follows:

§ 2.208 Deposit accounts.

* * * * *

(c) * * *

(4) A payment to replenish a deposit account may be submitted by mail with a private delivery service or hand-carrying the payment to: Director of the U.S. Patent and Trademark Office, Attn: Deposit Accounts, 2051 Jamieson Avenue, Suite 300, Alexandria, Virginia 22314.

PART 3—ASSIGNMENT, RECORDING AND RIGHTS OF ASSIGNEE

■ 16. The authority citation for 37 CFR part 3 continues to read as follows:

Authority: 15 U.S.C. 1123; 35 U.S.C. 2(b)(2).

■ 17. Section 3.28 is revised to read as follows:

§ 3.28 Requests for recording.

Each document submitted to the Office for recording must include a single cover sheet (as specified in § 3.31) referring either to those patent applications and patents, or to those trademark applications and registrations, against which the document is to be recorded. If a document to be recorded includes interests in, or transactions involving, both patents and trademarks, then separate patent and trademark cover sheets, each accompanied by a copy of the document to be recorded, must be submitted. If a document to be recorded is not accompanied by a completed cover sheet, the document and the incomplete cover sheet will be returned pursuant to § 3.51 for proper completion, in which case the document and a completed cover sheet should be resubmitted.

■ 18. Section 3.31 is amended by revising paragraph (a)(7)(i) to read as follows:

§ 3.31 Cover sheet content.

(a) * * *

(7) * * *

(i) Place a symbol comprised of letters, numbers, and/or punctuation marks between forward slash marks (*e.g.* /Thomas O'Malley III/) in the signature block on the electronic submission; or

* * * * *

■ 19. Section 3.73 is amended by revising paragraph (b)(1)(i) to read as follows:

§ 3.73 Establishing right of assignee to take action.

* * * * *

(b)(1) * * *

(i) Documentary evidence of a chain of title from the original owner to the assignee (*e.g.*, copy of an executed assignment). For trademark matters only, the documents submitted to establish ownership may be required to be recorded pursuant to § 3.11 in the assignment records of the Office as a condition to permitting the assignee to take action in a matter pending before the Office. For patent matters only, the submission of the documentary evidence must be accompanied by a statement affirming that the documentary evidence of the chain of title from the original owner to the assignee was or concurrently is being submitted for recordation pursuant to § 3.11; or

* * * * *

PART 5—SECRECY OF CERTAIN INVENTIONS AND LICENSES TO EXPORT AND FILE APPLICATIONS IN FOREIGN COUNTRIES

■ 20. The authority citation for 37 CFR part 5 is revised to read as follows:

Authority: 35 U.S.C. 2(b)(2), 41, 181–188, as amended by the Patent Law Foreign Filing Amendments Act of 1988, Pub. L. 100–418, 102 Stat. 1567; the Arms Export Control Act, as amended, 22 U.S.C. 2571 *et seq.*; the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*; the Nuclear Non Proliferation Act of 1978; 22 U.S.C. 3201 *et seq.*; and the delegations in the regulations under these Acts to the Director (15 CFR 734.3(b)(1)(v), 22 CFR 125.04, and 10 CFR 810.7), as well as the Export Administration Act of 1979, 50 U.S.C. app. 2401 *et seq.*; the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.*; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 2, 2005, 70 FR 45273 (August 5, 2005).

■ 21. Section 5.11 is amended by revising paragraphs (b) and (c) to read as follows:

§ 5.11 License for filing in a foreign country an application on an invention made in the United States or for transmitting international application.

* * * * *

(b) The license from the Commissioner for Patents referred to in paragraph (a) would also authorize the export of technical data abroad for purposes relating to the preparation, filing or possible filing and prosecution of a foreign patent application without separately complying with the regulations contained in 22 CFR parts 121 through 130 (International Traffic in Arms Regulations of the Department of State), 15 CFR parts 730–774 (Regulations of the Bureau of Industry and Security, Department of Commerce) and 10 CFR part 810 (Foreign Atomic Energy Programs of the Department of Energy).

(c) Where technical data in the form of a patent application, or in any form, are being exported for purposes related to the preparation, filing or possible filing and prosecution of a foreign patent application, without the license from the Commissioner for Patents referred to in paragraphs (a) or (b) of this section, or on an invention not made in the United States, the export regulations contained in 22 CFR parts 120 through 130 (International Traffic in Arms Regulations of the Department of State), 15 CFR parts 730–774 (Bureau of Industry and Security Regulations, Department of Commerce) and 10 CFR part 810 (Assistance to Foreign Atomic Energy Activities Regulations of the Department of Energy) must be complied with unless a license is not required because a United States application was on file at the time of export for at least six months without a secrecy order under § 5.2 being placed thereon. The term ''exported'' means export as it is defined in 22 CFR part 120, 15 CFR part 734 and activities covered by 10 CFR part 810.

* * * * *

■ 22. Section 5.19 is revised to read as follows:

§ 5.19 Export of technical data.

(a) Under regulations (15 CFR 734.3(b)(1)(v)) established by the Department of Commerce, a license is not required in any case to file a patent application or part thereof in a foreign country if the foreign filing is in accordance with the regulations (§§ 5.11 through 5.25) of the U.S. Patent and Trademark Office.

(b) An export license is not required for data contained in a patent application prepared wholly from foreign-origin technical data where such application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office (15 CFR 734.10(a)).

PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

■ 23. The authority citation for 37 CFR part 10 continues to read as follows:

Authority: 5 U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 2, 6, 32, 41.

■ 24. Section 10.112 is amended by revising paragraph (a) to read as follows:

§ 10.112 Preserving identity of funds and property of client.

(a) All funds of clients paid to a practitioner or a practitioner's firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the United States or, in the case of a practitioner having an office in a foreign country or registered under § 11.6(c), in the United States or the foreign country.

* * * * *

Dated: September 19, 2005.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 05–19128 Filed 9–23–05; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[R05–OAR–2005–IN–0004; FRL–7972–6]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Indiana; Lake County Sulfur Dioxide Regulations, Redesignation and Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision for the control of sulfur dioxide (SO_2) emissions in Lake County, Indiana. The SIP revision submitted by the Indiana Department of Environmental Management (IDEM) amends 326 Indiana Administrative Code (IAC) Article 7. Indiana's revised SO_2 rule consists of changes to 326 IAC 7–4 which sets forth facility-specific SO_2 emission limitations and recordkeeping requirements for Lake County. The rule revision also reflects updates to company names, updates to emission limits currently in permits, deletion of facilities that are already covered by natural gas limits, and other corrections and updates. Due to changes in section numbers, references to citations in other parts of the rule have also been updated. EPA is also approving a request to redesignate the Lake County nonattainment area to attainment of the SO_2 National Ambient Air Quality Standards (NAAQS). In conjunction with these actions, EPA is also approving the maintenance plan for the Lake County nonattainment area to ensure that attainment of the NAAQS will be maintained. The SIP revision, redesignation request and maintenance plan are approvable because they satisfy the requirements of the Clean Air Act (Act).

DATES: This final rule is effective on October 26, 2005.

ADDRESSES: EPA has established a docket for this action under Regional Material in EDocket (RME) Docket ID No. R05–OAR–2005–IN–0004. All documents in the docket are listed in the RME index at *http://docket.epa.gov/rmepub/,* once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. We recommend that you telephone Christos Panos, Environmental Engineer, at (312) 353–8328 before visiting the Region 5 office. This Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Christos Panos, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8328. *panos.christos@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplemental information section is arranged as follows:

I. What Is the Background for This Action?

On July 29, 2005 (70 FR 43820) EPA proposed to approve into the Indiana SIP SO_2 emission limitations applicable in Lake County, Indiana. Specifically, EPA proposed to approve amendments to rules 326 IAC 7–1.1–1, 326 IAC 7–1.1–2, 326 IAC 7–2–1, and newly created 326 IAC 7–4.1. The revised rules were adopted by the Indiana Air Pollution Control Board on March 2, 2005, and were submitted by IDEM to EPA on April 8, 2005. IDEM submitted a supplement to its submission on July 6, 2005, indicating that the revised rules became effective June 24, 2005, and were published in the Indiana Register on July 1, 2005. EPA proposed to approve the SO_2 redesignation request submitted by the State of Indiana on June 21, 2005 to redesignate the Lake County SO_2 nonattainment area to attainment of the SO_2 NAAQS. IDEM submitted a supplement to its submission on August 11, 2005, indicating that the State's public comment period concluded on July 29, 2005, and that no comments were received. Finally, EPA proposed to approve the maintenance plan submitted for this area.

EPA proposed this action because the State's submittal for the Lake County SO_2 nonattainment area met the requirements of the Act. The revised rules amend SO_2 requirements for many sources in the nonattainment area, and reflect a reduction of over 30,000 tons of SO_2 per year of allowable emissions compared to the emission limits in the previously approved 1989 SIP. The SIP revision provides for attainment and maintenance of the SO_2 NAAQS and satisfies the requirements of part D of the Act applicable to SO_2 nonattainment areas. Further, EPA proposed to approve the maintenance plan and redesignation of the Lake County SO_2 nonattainment area to attainment because the State has met the redesignation and maintenance plan requirements of the Act. A more detailed explanation of how the State's submittal meets these requirements is contained in our July 29, 2005 proposal.

II. What Comments Did We Receive on the Proposed Action?

EPA provided a 30-day review and comment period on the proposal published in the **Federal Register** on July 29, 2005 (70 FR 43820). We received no comments on our proposed rulemaking.

III. What Action Is EPA Taking Today?

EPA is approving the SIP revision for the control of SO_2 emissions in Lake County, Indiana, as requested by the State on April 8, 2005, and supplemented on July 6, 2005. The revision consists of the amended rule at 326 Indiana Administrative Code (IAC) Article 7. In this rule, the requirements in the Table in 326 IAC 7–4–1.1 have been divided into separate sections for each facility for clarity and ease of future rule actions. The new rule, 326 IAC 7–4.1, replaces 326 IAC 7–4–1.1, which will be repealed. Because the State has complied with the requirements of section 107(d)(3)(E) of the Act, EPA is also approving the redesignation of the Lake County nonattainment area to attainment of the SO_2 NAAQS, as requested by the State on June 21, 2005. In conjunction with these actions, EPA is also approving Indiana's maintenance plan for the Lake County SO_2 nonattainment area as a SIP revision because it meets the requirements of section 175A of the Act.

IV. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant energy action,'' this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001).

Regulatory Flexibility Act

This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

National Technology Transfer Advancement Act

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 25, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* Section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: September 13, 2005.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart P—Indiana

■ 2. Section 52.770 is amended by adding paragraph (c)(172) to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

(172) On April 8, 2005, and as supplemented on July 6, 2005, Indiana submitted a State Implementation Plan (SIP) revision for the control of sulfur dioxide (SO_2) emissions in Lake County, Indiana. The SIP revision submitted by the Indiana Department of Environmental Management (IDEM) amends 326 Indiana Administrative Code (IAC) Article 7. Indiana's revised SO_2 rule consists of changes to 326 IAC 7–4 which sets forth facility-specific SO_2 emission limitations and recordkeeping requirements for Lake County. The rule revision also reflects updates to company names, updates to emission limits currently in permits, deletion of facilities that are already covered by natural gas limits, and other corrections and updates. Due to changes in section numbers, references to citations in other parts of the rule have also been updated.

(i) *Incorporation by reference.*

(A) Amendments to Indiana Administrative Code Title 326: Air Pollution Control Board, Article 7 SULFUR DIOXIDE RULES, Rule 1.1 Sulfur Dioxide Emission Limitations, sections 326 IAC 7–1.1–1, ''Applicability'', 326 IAC 7–1.1–2 ''Sulfur Dioxide Emission Limitations'', and 326 IAC 7–2–1 ''Reporting Requirements: Methods to Determine Compliance''; newly created 326 IAC 7–4.1, ''Lake County Sulfur Dioxide Emission Limitations'', adopted by the Indiana Air Pollution Control Board on March 2, 2005. Filed with the Secretary of State May 25, 2005, effective June 24, 2005.

■ 3. Section 52.795 is amended by adding a new paragraph (h) to read as follows:

§ 52.795 Control strategy: sulfur dioxide.

* * * * *

(h) Approval—On June 21, 2005, and as supplemented on August 11, 2005, the State of Indiana submitted a request to redesignate the Lake County sulfur dioxide (SO_2) nonattainment area to attainment of the NAAQS. In its submittal, the State also requested that EPA approve the maintenance plan for the area into the Indiana SO_2 SIP. The redesignation request and maintenance plan satisfy all applicable requirements of the Clean Air Act.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Section 81.315 is amended by revising the entry for Lake County in the table entitled ''Indiana—SO_2'' to read as follows:

§ 81.315 Indiana.

* * * * *

INDIANA—SO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
* * * * * * * * *				
Lake County				X
* * * * * * * * *				

* * * * *

[FR Doc. 05–19065 Filed 9–23–05; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7974–3]

North Dakota: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: North Dakota has applied to EPA for Final authorization of changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). EPA has determined that these changes satisfy all requirements for Final authorization and is authorizing the State's changes through this immediate Final action. EPA is publishing this rule to authorize the changes without a prior proposed rule because we believe this action is not controversial. Unless we get written comments opposing this authorization during the comment period, the decision to authorize North Dakota's changes to their hazardous waste program will take effect as provided below. If we receive comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect. A separate document in the proposed rules section of this **Federal Register** will serve as the proposal to authorize the State's changes.

DATES: We must receive your comments by October 26, 2005. Unless EPA receives comments that oppose this action, this Final authorization approval will become effective without further notice on November 25, 2005.

ADDRESSES: Submit your comments by one of the following methods: 1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments. 2. E-mail: *shurr.kris@epa.gov*. 3. Mail: Kris Shurr, 8P–HW, U.S. EPA, Region 8, 999 18th St, Ste. 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139. 4. Hand Delivery or Courier: to Kris Shurr, 8P–HW, U.S. EPA, Region 8, 999 18th St, Ste 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139.

Instructions: Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or e-mail. The Federal regulations.gov website is an ''anonymous access'' system which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy North Dakota's application at the following addresses: NDDH from 9 a.m. to 4 p.m., 1200 Missouri Ave, Bismarck, ND 58504–5264, contact: Curt Erickson, phone number (701) 328–5166 and EPA Region 8, from 8 a.m. to 3 p.m., 999 18th Street, Suite 300, Denver, CO 80202–2466, contact: Kris Shurr, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov*.

FOR FURTHER INFORMATION CONTACT: Kris Shurr, EPA Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov*.

SUPPLEMENTARY INFORMATION:

A. Why are revisions to state programs necessary?

States that have received final authorization from EPA under RCRA Section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program equivalent to, consistent with, and no less stringent than the Federal program. As the Federal program changes, States must change their programs and ask EPA to authorize their changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 Code of Federal Regulations (CFR) parts 124, 260 through 266, 268, 270, 273 and 279.

B. What decisions have we made in this rule?

We conclude that North Dakota's application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant North Dakota Final authorization to operate its hazardous waste program with the changes described in the authorization application. North Dakota has responsibility for permitting Treatment, Storage, and Disposal Facilities (TSDFs) within its borders, except in Indian country, and for carrying out those portions of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in North Dakota, including issuing permits, until North Dakota is authorized to do so.

C. What is the effect of today's authorization decision?

The effect of this decision is that facilities in North Dakota subject to

RCRA will now have to comply with the authorized State requirements instead of the equivalent Federal requirements. North Dakota has primary enforcement responsibility under its state hazardous waste program for violations of the program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, the authority to conduct inspections and require monitoring, tests, analyses, or reports; and enforce RCRA requirements and suspend or revoke permits.

This action does not impose additional requirements on the regulated community because the regulations for which North Dakota is being authorized are already effective and are not changed by today's action.

D. Why wasn't there a proposed rule before today's rule?

EPA did not publish a proposal before today's rule because this action is a routine program change, and we do not expect comments opposing this approval. We are providing an opportunity for public comment at this time. In addition, in the proposed rules section of today's **Federal Register**, there is a separate document that proposes to authorize the State program changes. If we receive comments opposing this authorization, that document will serve as a proposal to authorize the changes.

E. What happens if EPA receives comments opposing this action?

If EPA receives comments opposing this authorization, we will withdraw this rule by publishing a notice in the **Federal Register** before the rule becomes effective. We then will address all public comments in a later **Federal Register**. You may not have another opportunity to comment. If you want to comment on this action, you must do so at this time.

If we receive comments opposing authorization of only a particular change to the State hazardous waste program, we will withdraw that part of the rule. However, the authorization of program changes that are not opposed by any comments will become effective on the date specified above. The **Federal Register** withdrawal document will specify which part of the authorization will become effective and which part is being withdrawn.

F. What has North Dakota previously been authorized for?

North Dakota initially received Final authorization on October 5, 1984, effective October 19, 1984 (49 FR 39328) to implement the RCRA hazardous waste management program. We granted authorization for changes to their program on June 25, 1990, effective August 24, 1990 (55 FR 25836), May 4, 1992, effective July 6, 1992 (57 FR 19087), April 7, 1994, effective June 6, 1994 (59 FR 16566), and January 19, 2000, effective March 20, 2000 (65 FR 02897).

G. What changes are we authorizing with today's action?

On June 2, 2004, September 2, 2004 and October 26, 2004, North Dakota submitted final revision applications, seeking authorization of program changes in accordance with 40 CFR 271.21.

We now make an immediate final decision, subject to receipt of written comments opposing this action, that North Dakota's hazardous waste program revision satisfies all of the requirements necessary for Final authorization. Therefore, we propose to grant North Dakota final authorization for the following program changes (the Federal Citation followed by the analog from the North Dakota Administrative Code (NDAC), Article 33–24, as revised December 1, 2003, unless otherwise indicated: Delisting—(54 FR 27114, 06/27/89)(Checklist 17B.1)/changes to 40 CFR 260.22(b) only at 33–24–01.08.2 (ND was previously authorized for Checklist 17B (excluding 40 CFR 260.22(b)) on 06/25/90, effective 08/24/1990 at 55 FR 25836); Consolidated Checklist for the Burning of Hazardous Waste in Boilers and Industrial Furnaces (as of June 30, 2000) (56 FR 7134, 02/21/91(Checklist 85); 56 FR 32688, 07/17/91(Checklist 94); 56 FR 42504, 08/27/91(Checklist 96); 56 FR 43874, 09/05/91(Checklist 98); 57 FR 38558, 08/25/92(Checklist 111); 57 FR 44999, 09/30/02(Checklist 114); 58 FR 59598, 11/09/93(Checklist 127))/33–24–01–04/intro, 33–24–01–04.11, 33–24–01–04.56.a and .b, 33–24–01–04.59, 33–24–01–04.59.l and .m, 33–24–01–04.60, 33–24–01–04.95, 33–24–01–04.107, 33–24–01–05.1, 33–24–01–06.1, 33–24–02–02.4.b and .c, 33–24–02–02.5.b.(4), 33–24–02–03.3.b.(2)(b), 33–24–02–04.1.j, 33–24–02–04.2.d, 2.g and 2.h, 33–24–02–06.1.b, 33–24–02–06.1.b.(2), 33–24–02–06.1.c.(4) and c.(5), 33–24–02–17, 33–24–02/Appendix IV, 33–24–05–01.6.b, 33–24–05–61.4.a, 33–24–05–144.1, 33–24–05–220.3 and 220.4, 33–24–05–525.1 through 525.6, 33–24–05–526.1 through 526.3, 33–24–05–527.1.a, 33–24–05–526.1.b through 526.1.b.(9), 33–24–05–527.2.a and 2.b, 33–24–05–527.3, 33–24–05–527.4.a through 527.4.d.(4), 33–24–05–527.5.a through 527.5.k, 33–24–05–528.1.a.(1) through 528.1.a.(3), 33–24–05–528.1.b through 528.12, 33–24–05–529.1.a through 529.9, 33–24–05–530.1 through 530.3, 33–24–05–531.1 through 531.9, 33–24–05–532.1 through 532.8, 33–24–05–533.1 through 533.5, 33–24–05–534.1 through 534.2.b, 33–24–05–535 through 535.6.d, 33–24–05–536.1 through 536.5.f, 33–24–05–537 through 537.3.b.(2), 33–24–05/Appendix XVI/table I–A through table I–E, 33–24–05/Appendices XVII through XXVII, 33–24–06–14.3.a.(4), 33–24–06–14.7 through 14.7.a.(5), 33–24–06–14/Appendix I, 33–24–06–16.5, 33–24–06–17.2.ff, and 33–24–06–19.4; Consolidated Checklist for Recycled Used Oil Management Standards (as of June 30, 2000) (57 FR 41566, 09/10/92(Checklist 112); 58 FR 26420, 05/03/93 and 58 FR 33341, 06/17/93(Checklist 122 and 122.1); 59 FR 10550, 03/04/94(Checklist 130); 63 FR 24963, 05/06/98 and 63 FR 37780, 07/14/98(Checklist 166))/33–24–01–04.137, 33–24–02–03.1.b.(5), 33–24–02–04.2.m through 2.o, 33–24–02–05.10, 33–24–02–06.1.b.(3) and b.(4), 33–24–02–06.1.c.(2) through 1.d, 33–24–05–01.6.b, 33–24–05–220 through 224 (reserved), 33–24–05–600 through 600.20, 33–24–05–610 through 610.9, 33–24–05–611, 33–24–05–611/table 1 and table 1 note, 33–24–05–612.1 through 612.3.c, 33–24–05–620.1 through 620.2.e, 33–24–05–621.1 and 621.2, 33–24–05–622 through 622.4.d, 33–24–05–623 through 623.3, 33–24–05–624 through 624.3.c, 33–24–05–630.1 and 630.2, 33–24–05–631.1 and 631.2, 33–24–05–632.1 and 632.2, 33–24–05–640.1 through 640.4.e, 33–24–05–641.1 through 641.3, 33–24–05–642.1 and 642.2, 33–24–05–643.1 through 643.3.e, 33–24–05–644.1 through 644.4, 33–24–05–645 through 645.8.d, 33–24–05–646.1 through 646.4, 33–24–05–647, 33–24–05–650.1 and 650.2, 33–24–05–651.1 and 651.2, 33–24–05–652.1 and 652.2, 33–24–05–653.1 through 653.3, 33–24–05–654 through 654.8, 33–24–05–655 through 655.2, 33–24–05–656.1 through 656.3, 33–24–05–657 through 657.2, 33–24–05–658 and 659, 33–24–05–660.1 through 660.3, 33–24–05–661.1 and 661.2, 33–24–05–662.1 and 662.2, 33–24–05–663.1 through 663.4, 33–24–05–664 through 664.7, 33–24–05–665.1 and 665.2, 33–24–05–666.1 and 666.2, 33–24–05–667, 33–24–05–670.1 through 670.3, 33–24–05–671 through 671.2, 33–24–05–672.1 and 672.2, 33–24–05–673.1 and 673.2, 33–24–05–674.1 through 674.3, 33–24–05–675.1 and 675.2, 33–24–05–680, 33–24–05–681.1 and 681.2, and 33–24–06–16.5; Recycled Coke By-Product Exclusion (57 FR 27880, 06/22/92)(Checklist 105)/33–24–02–04.1.j, and 33–24–05–525.1; Coke By-Products Listings (57 FR 37284, 08/18/

92)(Checklist 110)/33–24–02–04.1.j, 33–24–02–17, and 33–24–02/Appendix IV; Boilers and Industrial Furnaces: Changes for Consistency with New Air Regulations (58 FR 38816, 07/20/93)(Checklist 125)/33–24–01.05.1.l, 33–24–05–529.5.c, 33–24–05–531.8, and 33–24–05/Appendix XXV (reserved); Testing and Monitoring Activities (58 FR 46040, 08/31/93 and 59 FR 47980, 09/19/94)(Checklists 126 and 126.1)/33–24–01–05.1, 33–24–01–08.4.a.(1), 33–24–02–12.1.a and 12.1.b, 33–24–02–14.1, 33–24–02/Appendices II, III, V, and VII, 33–24–05–103.1, 33–24–05–183.3, 33–24–05–256.1, 33–24–05–280.1, 33–24–05–281.1, 33–24–06–16.5, 33–24–06–17.2.w.(3)(a)[3] and 17.2.w.(3)(a)[4], 33–24–06–19.2.b.(2)(a)[3] and 19.2.b.(2)(a)[4], 33–24–06–19.4.c.(2)(a) and 19.4.c.(2)(b); Wastes From the Use of Chlorophenolic Formulations in Wood Surface Protection (59 FR 458, 01/04/94)(Checklist 128)/33–24–01–05.1 and 33–24–02 Appendix V; Revision of Conditional Exemption for Small Scale Treatability Studies (59 FR 8362, 02/18/94)(Checklist 129)/33–24–02–04.5.b.(1) and (2), 33–24–02–04.5.c. through c.3(e), and 33–24–02–04.6.c. through .e; Recordkeeping Instructions; Technical Amendment (59 FR 13891, 03/24/94)(Checklist 131)/33–24–05 Appendix 1/Tables 1 and 2, and 33–24–06–16.5; Wood Surface Protection; Correction (59 FR 28484, 06/02/94)(Checklist 132)/33–24–01–05.1; Letter of Credit Revision (59 FR 29958, 06/10/04)(Checklist 133)/33–24–05–81.4, and 33–24–05–81.11; Correction of Beryllium Powder (P015) Listing (59 FR 31551, 06/20/94) Checklist 134)/33–24–02–18.5, 33–24–02/Appendix V, and 33–24–05–282.1/Table 2; Recovered Oil Exclusion (59 FR 38536, 07/28/94) (Checklist 135)/33–24–02–03.3.b.(2)(b), 33–24–02–04.1.l, 33–24–02–06.1.c.(4) through (6), and 33–24–05–525.2.c; Removal of the Conditional Exemption for Certain Slag Residues (59 FR 43496, 08/24/94)(Checklist 136)/33–24–05–201.3, 33–24–05–281.1/Table CCWE; Testing and Monitoring Activities Amendment I (60 FR 3089, 01/13/95)(Checklist 139)/33–24–01–05.1; Carbamate Production Identification and Listing of Hazardous Waste (60 FR 7824, 02/09/95; 60 FR 19165, 04/17/95; 60 FR 25619, 05/12/95)(Checklists 140 through 140.2)/33–24–02–03.1.b.(4)(e) through (g), 33–24–02–03.3.b.(2)(d), 33–24–02–17, 33–24–02–18.5 and .6, and 33–24–02/Appendices IV and V; Testing and Monitoring Activities Amendment II (60 FR 17001, 04/04/95)(Checklist 141)/33–24–01–05.1.(k); Universal Waste: General Provisions (60 FR 25492, 05/11/95)(Checklist 142A)/33–24–01–04, 33–24–01–04.23, 33–24–01–04.47, 33–24–01–04.86, 33–24–01–04.121, 33–24–01–04.132 through 134, 33–24–02–05.3, 33–24–02–05.6.c through .c(4), 33–24–02–05.6.c.(6) and (7), 33–24–02–05.7.c through .c(4), 33–24–02–05.7.c.(6) and (7), 33–24–02–06.5., 33–24–03–01.1. through 5, 33–24–03–02.4, 33–24–05–01.6.j, 33–24–05–250.6, 33–24–05–701.1 and .2, 33–24–05–708.1 and .2, 33–24–05–709 introductory paragraph, 33–24–05–709.2 and .3, 33–24–05–710, 33–24–05–711, 33–24–05–712, 33–24–05–714 introductory paragraph, 33–24–05–715.1 through .3, 33–24–05–716, 33–24–05–717, 33–24–05–718.1 through .8., 33–24–05–719 and 720, 33–24–05–730 and 731, 33–24–05–732.1.a and .b, 33–24–05–732.2, 33–24–05–734 introductory paragraph, 33–24–05–735, 33–24–05–736, 33–24–05–737, 33–24–05–738, 33–24–05–739.1 through .3, 33–24–05–740, 33–24–05–750, 33–24–05–751, 33–24–05–752.1 through .3, 33–24–05–753.1 and 2, 33–24–05–753.3 and .4, 33–24–05–754, 33–24–05–755, 33–24–05–756, 33–24–05–760, 33–24–05–761, 33–24–05–762, 33–24–05–770, 33–24–06–01.2.b.(8), and 33–24–06–16.5; 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61 FR 15660, 04/08/96; 61FR19117, 04/30/96; 61 FR 33680, 06/28/96; 61 FR 36419, 07/10/96; 61 FR 43924, 08/26/96; 62 FR 7502, 02/19/97;) (Checklist 151 through 151.6)/33–24–05–250.3.c and .d, 33–24–05–250.5.c through .e, 33–24–05–251.5, 33–24–05–251.10 and .11, 33–24–05–252.1 through .3, 33–24–05–256.1, 33–24–05–256.1.a.(2), 33–24–05–256.1.a.(4) through (6), 33–24–05–256.1.b.(1)(b), 33–24–05–256.1.c.(2), 33–24–05–256.2.d.(2), 33–24–05–256.2.e.(4) and (5), 33–24–05–257., 33–24–05–258.1, 33–24–05–258.4, 33–24–05–258.4.a.(1) and (2), 33–24–05–258.4.c, 33–24–05–258.5 through .7, 33–24–05–279.1 through .7, 33–24–05–280.1, 33–24–05–280.5, 33–24–05–280.7, 33–24–05–280/Table, 33–24–05–282/Table 1, 33–24–05–284.1, 33–24–05–288/Table UTS, 33–24–05/Appendix XXIX; Conditionally Exempt Small Quantity Generator Disposal Options under Subtitle D (61 FR 34252, 07/01/96)(Checklist 153)/33–24–02–05.6.c and 33–24–02–05.7.c; Consolidated Organic Air Emission Standards for Tanks, Surface Impoundments, and Containers (59 FR 62896, 12/06/94; 60 FR 26828, 05/19/95; 60 FR 50426, 09/29/95; 60 FR 56952, 11/13/95; 61 FR 4903, 02/09/96; 61 FR 28508, 06/05/96; 61 FR 59932, 11/25/96)(Checklists 154 through 154.6)/33–24–01–05.1.n and 1.o, 33–24–01–05.2, 33–24–02–06.3.a, 33–24–03–12.1.a, 33–24–03–12.4.b, 33–24–05–04.2.f and h, 33–24–05–06.2.d, 33–24–05–40.2.c and f, 33–24–05–44.3, 33–24–05–98, 33–24–05–115, 33–24–05–128, 33–24–05–301, 33–24–05–400.2, 33–24–05–403.1.b.(1), 33–24–05–403.6.b.(6)(b),

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and 33–24–05–709.3; Organic Air Emission Standards: Clarification and Technical Amendments (64 FR 3382, 01/21/99)(Checklist 177)/33–24–03–12.1.a.(1) and (2), 33–24–05–401.12, 33–24–05–401.25, 33–24–05–401.30, 33–24–05–450.2.e, 33–24–05–453.1.a.(1) and (2), 33–24–05–454.2.a.(1) and (2), 33–24–05–454.8.c, 33–24–05–456.5.f, and 33–24–06–16.5; Petroleum Refining Process Wastes—Leachate Exemption (64 FR 06806, 02/11/99)(Checklist 178)/33–24–02–04.2.o; Land Disposal Restrictions Phase IV—Technical Corrections (64 FR 25408, 05/11/99)(Checklist 179)/33–24–02–02.3.c, 33–24–02–02.3.d/table, 33–24–02–02.5.a.(3), 33–24–02–04.1.p and 04.1.q, 33–24–02–04.1.q.(5), 33–24–02–04.2.g.(3) and (3)(a), 33–24–03–12.4.d., 33–24–05–251.4, 33–24–05–251.9, 33–24–05–256.1.d/table, 33–24–05–256.c.(2)/table, 33–24–05–256.2.d.(4), 33–24–05–258.4.b and b.(1), 33–24–05–280.9 and 280.10, 33–24–05–280/table, 33–24–05–288.1/table, 33–24–05–289.3.c, and 33–24–05–289.3.c.(1 and 2); Test Procedures for the Analysis of Oil and Grease and Non-Polar Material (64 FR 26315, 05/14/99)(Checklist 180)/33–24–01.05.1.k and 33–24–01–05.1.p; Universal Waste Rule: Specific Provisions for Hazardous Waste Lamps (64 FR 36466, 07/06/99)(Checklist 181)/33–24–01–04.66, 33–24–01–04.132, 33–24–02–06.5.b through 5.d, 33–24–05–01.6.j.(2) through j.(4), 33–24–05–250.6.b through 6.d, 33–24–05–701.1.b through 1.d, 33–24–05–702.1.a, 33–24–05–702.2.b and 2.c, 33–24–05–703.1, 33–24–05–704.1, 33–24–05–705.1 through 705.3, 33–24–05–706 through 708, 33–24–05–709.2 and 709.3, 33–24–05–710, 33–24–05–713.4, 33–24–05–713.4.a and 4.b, 33–24–05–714.5, 33–24–05–730, 33–24–05–732.2.d and 2.e, 33–24–05–733.4, 33–24–05–733.4.a and 4.b, 33–24–05–734.5, 33–24–05–750, 33–24–05–760.1, 33–24–05–781.1, 33–24–06–01.2.b.(8)(b) through (8)(d), and 33–24–06–16.5; Hazardous Air Pollutant Standards for Combustors (64 FR 52828, 09/30/99 and 64 FR 63209, 11/19/99)(Checklists 182 and 182.1)/33–24–01–04.25, 33–24–01–04.120, 33–24–02–22/Table 1, 33–24–05–144.2 through 144.5, 33–24–05–301, 33–24–05–525.2 through 525.8, 33–24–05–526.3 and 526.3.a, 33–24–05–530.3 through 530.4, 33–24–05–537.2.a, 33–24–05–537.2.b.(1) and 537.2.b(1)/Note, 33–24–05 Appendix XXIII, 33–24–06–16.5, 33–24–06–17.2.w and 17.2.w.(5), 33–24–06–17.2.ff, 33–24–06 Appendix I, 33–24–06–19.2, and 33–24–06–19.4; Land Disposal Restrictions Phase IV—Technical Corrections (64 FR 56469, 10/20/99)(Checklist 183)/33–24–02–17, 33–24–03–12.1.d, 33–24–05–256.1.c.(3), 33–24–05–280.10, 33–24–05–280/table, and 33–24–05–289.3.a.(1) and a.(2); Accumulation Time for Waste Water Treatment Sludges (65 FR 12378, 03/08/00)(Checklist 184)/33–24–03–12.1.d and 33–24–03–12.7 through 12.9; Petroleum Refining Process Wastes—Clarification (65 FR 36365, 06/08/00)(Checklist 187)/33–24–02–16.1/table and 33–24–05/Appendix XI; Hazardous Air Pollutant Standards; Technical Corrections (65 FR 42292, 07/10/00)(Checklist 188)/33–24–02–22.3.b.(4), 33–24–05–144.2.a and 2.c, and 33–24–06–14.10.a; Chlorinated Aliphatics Listing and LDRs for Newly Identified Wastes (65 FR 67068, 11/08/00)(Checklist 189)/33–24–02–17, 33–24–02/Appendices IV and V, 33–24–05–273.1 through 273.4, 33–24–05–280/table, and 33–24–05–288/table; Land Disposal Restrictions Phase IV—Deferral for PCBs in Soil (65 FR 81373, 12/26/00)(Checklist 190)/33–24–05–272.1 and 272.2, 33–24–05–288/table, 33–24–05–289.4, and 33–24–05/Appendix VII; Mixed Waste Rule (66 FR 27218, 05/16/01)(Checklist 191)/33–24–05–850, 33–24–05–855 through 857, 33–24–05–860, 33–24–05–865.1 and 865.2, 33–24–05–866.1 and 866.2, 33–24–05–870.1 and 870.2, 33–24–05–875.1 and 875.2, 33–24–05–880, 33–24–05–885, 33–24–05–890, 33–24–05–895 through 900, 33–24–05–905.1 and 905.2, 33–24–05–910, 33–24–05–915.1 and 915.2, and 33–24–05–916.1 and 916.2; Mixture and Derived-From Rules Revisions (66 FR 27266, 05/16/01)(Checklist 192A)/33–24–02–03.1.b.(3) and b.(4), 33–24–02–03.3.b.(1), and 33–24–02–03.7 and 03.8; Land Disposal Restrictions Correction (66 FR 27266, 05/16/01)(Checklist 192B)/33–24–05/Appendix XI/Table 1; Change of Official EPA Mailing Address (66 FR 34374, 06/28/01)(Checklist 193)/33–24–01–05.1.k; Mixture and Derived-From Rules Revision II (66 FR 50332, 10/03/01)(Checklist 194)/33–24–02–03.1.b.(4) and 33–24–02–03.7.c; Inorganic Chemical Manufacturing Wastes Identification and Listing (66 FR 58258, 11/20/01 and 67 FR 17119, 04/09/02)(Checklist 195)/33–24–02–04.2.o, 33–24–02–17, 33–24–02/Appendix IV, 33–24–05–276.1 through 276.3, and 33–24–05–280/table; Hazardous Air Pollutant Standards for Combustors: Interim Standards (67 FR 6792, 02/13/02)(Checklist 197)/33–24–05–144.2.a and 2.d, 33–24–05–525.2.b.(1) through b.(5), 33–24–06–16.5, 33–24–06–17.2.w.(5), 33–24–06–17.2.ff, 33–24–06–19.2, 33–24–06–19.4, and 33–24–06–100.1 and 100.2; Hazardous Air Pollutant Standards for Combustors: Corrections (67 FR 06968, 02/14/02)(Checklist 198)/33–24–05–525.1, 33–24–05–525.2.a, 33–24–05–525.4.a.(1)(b), 33–24–05–525.4.b.(1) and b.(2), 33–24–05–525.4.c, 33–24–05–525.4.c.(1) and c.(1)(d), and 33–24–06–14.10.a; Vactur of Mineral Processing Spent Materials Being Reclaimed as Solid Wastes and TCPL Use with MGP Waste (67 FR 11251, 03/13/02) (Checklist 199)/33–24–02–02.3.c, 33–24–02–04.1.q, and 33–24–02–14.1; Zinc Fertilizer Rule (67 FR 48393, 07/24/02)(Checklist 200)/33–24–02.04.1.t and 1.u, 33–24–05–201.4, and 33–24–05–280.9 (reserved); Treatment Variance for Radioactivity Contaminated Batteries (67 FR 62618, 10/07/02)(Checklist 201)/33–24–05–280/table/Treatment Standards for Hazardous Wastes; Hazardous Air Pollutant Standards for Combustors—Corrections 2 (67 FR 77687, 12/19/2002) (Checklist 202)/33–24–06–17.2.w.(5), 33–24–06–17.2.ff, 33–24–06–19.2, and 33–24–06–19.4.

H. Where are the revised state rules different from the Federal rules?

We consider the following State requirements to be more stringent than the Federal requirements: 33–24–01–04.27, because the State does not allow a closed or closing unit to be designated as a corrective action management unit; 33–24–02–04.2.i, because the State excludes only discarded wood or wood products that fail for the Toxic Characteristic Leaching Procedure for arsenic while Federal rules exclude discarded wood or wood products that fail for Hazardous Waste Codes D004 through D017; 33–24–03–12.1.a(1), because North Dakota subjects containers to full status rather than interim status standards; 33–24–03–12.1.a(2), because North Dakota subjects tanks to full status rather than interim status standards; 33–24–03–12.1.a(1), because North Dakota subjects containment buildings to full status rather than interim status standards; 33–24–03–12.1.d, because the State requires that facilities be designed, constructed, maintained, and operated to minimize the potential for fires, explosions, or any unplanned releases and because the State requires that the facility demonstrate that a particular kind of equipment will not be required; 33–24–05–01.2, because the State does not allow for interim status facilities; 33–24–05–04.1.a, because the State does not allow owners/operators of closed landfills to accept non-hazardous waste under certain conditions; 33–24–05–256.2.e.(3), because the State does not allow a treatment facility with interim status units to treat hazardous waste; 33–24–05–281.2, because the State does not differentiate between high and low zinc non-wastewater (K061 wastes); 33–

24–05–282.1.b and 33–24–05–282.1, Table 1, because the State does not allow a treatment facility with interim status units to treat hazardous waste; 33–24–05–282.3.a, because the State does not allow a treatment facility with interim status units to treat hazardous waste; 33–24–05–282.3.c, because the State does not allow lab packs eligible for land disposal to be disposed at interim status landfills; 33–24–05–283.3.a, because the State does not allow a treatment facility with interim status units to treat hazardous waste; 33–24–05–552.2.a.1 and 2.b, because the State does not have an analog to 40 CFR 265.113 for interim facilities; 33–24–05–739.3.c, because the state automatically extends the record retention period during any unresolved enforcement action; 33–24–05–752.3 because the state requires universal waste transporters to comply with the solid waste transporter permit requirements of 33–20–02.1–01; 33–24–05–753.3 and .4, because the state has record keeping and retention requirements; 33–24–06–33.6, because the State requires any facility with an effective remedial action plan to submit a new application at least 180 days before expiration date of the current plan; North Dakota does not have an equivalent to 40 CFR 145(f)(9) making the State more stringent. Nevertheless, these requirements are part of North Dakota's authorized program and are Federally enforceable.

We also consider the following State requirements to be broader-in-scope than the Federal program at 33–24–06–14.7.a.(3), because the State has requirements for newly regulated wastes and units that are not required by Federal rules. Broader-in-scope requirements are not part of the authorized program, and EPA cannot enforce them. Although a facility must comply with these requirements in accordance with State law, they are not RCRA requirements.

EPA cannot delegate the Federal requirements at 40 CFR 268.5, 268.6, 268.42(b), and 268.44. EPA will continue to implement these requirements.

I. Who handles permits after this authorization takes effect?

North Dakota will issue and administer permits for all the provisions for which it is authorized. EPA will continue to administer any RCRA hazardous waste permits or portions of permits that we issued prior to the effective date of this authorization. EPA will transfer any pending permit applications, completed permits, or pertinent file information to North Dakota within 30 days of this approval. We will not issue any more new permits or new portions of permits for the provisions listed in the Table above after the effective date of this authorization. EPA and North Dakota have agreed to joint permitting and enforcement for those HSWA requirements for which North Dakota is not yet authorized.

J. How does today's action affect Indian country (18 U.S.C. 1151) in North Dakota?

North Dakota is not authorized to carry out its hazardous waste program in Indian country, as defined in 18 U.S.C. 1151. This includes, but is not limited to:

1. Lands within the exterior boundaries of the following Indian Reservations located within or abutting the State of North Dakota:
   a. Fort Totten Indian Reservation
   b. Fort Berthold Indian Reservation
   c. Standing Rock Indian Reservation
   e. Turtle Mountain Indian Reservation
2. Any land held in trust by the U.S. for an Indian tribe, and
3. Any other land, whether on or off a reservation that qualifies as Indian country within the meaning of 18 U.S.C. 1151.

Therefore, this program revision does not extend to Indian country where EPA will continue to implement and administer the RCRA program in these lands.

K. What is codification and is EPA codifying North Dakota's hazardous waste program as authorized in this rule?

Codification is the process of placing the State's authorized hazardous waste program statutes and regulations into the Code of Federal Regulations. We do this by referencing the authorized State rules in 40 CFR part 272. We reserve the amendment of 40 CFR part 272, subpart JJ for this authorization of North Dakota's program until a later date.

L. Administrative Requirements

The Office of Management and Budget has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, October 4, 1993), and therefore this action is not subject to review by OMB. This action authorizes State requirements for the purpose of RCRA 3006 and imposes no additional requirements beyond those imposed by State law. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this action authorizes pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). For the same reason, this action also does not significantly or uniquely affect the communities of Tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely authorizes State requirements as part of the State RCRA hazardous waste program without altering the relationship or the distribution of power and responsibilities established by RCRA. This action also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant and it does not make decisions based on environmental health or safety risks. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

Under RCRA 3006(b), EPA grants a State's application for authorization as long as the State meets the criteria required by RCRA. It would thus be inconsistent with applicable law for EPA, when it reviews a State authorization application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This rule does not

impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This action will be effective November 25, 2005.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous waste, Hazardous waste transportation, Incorporation-by-Reference, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: September 19, 2005.

Robert E. Roberts,

Regional Administrator, Region 8.

[FR Doc. 05–19136 Filed 9–23–05; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126333–5040–02; I.D. 092105A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Areas 620 and 630 of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for pollock in Statistical Area 630 of the Gulf of Alaska (GOA) for 24 hours and opening directed fishing for pollock in Statistical area 620 of the GOA. This action is necessary to fully use the C season allowance of the 2005 total allowable catch (TAC) of pollock specified for Statistical Areas 620 and 630.

DATES: Opening directed fishing for pollock in Statistical area 630 of the Gulf of Alaska: Effective 1200 hrs, Alaska local time (A.l.t.), September 22, 2005, through 1200 hrs, A.l.t., September 23, 2005. Opening directed fishing for pollock in Statistical area 620 of the Gulf of Alaska: Effective 1200 hrs, A.l.t., September 22, 2005, through 1200 hrs, A.l.t., October 1, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for pollock in Statistical Area 630 of the GOA under § 679.20(d)(1)(iii) on August 27, 2005 (70 FR 51300, August 30, 2005). NMFS opened directed fishing for pollock in Statistical Area 630 of the GOA for 48 hrs on September 8, 2005 (70 FR 53971, September 13, 2005) and for 24 hrs on September 15, 2005 (70 FR 55305, September 21, 2005).

NMFS has determined that approximately 1,550 mt of pollock remain in the directed fishing allowance for Statistical Area 630 of the GOA. Therefore, in accordance with 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the C season allowance of the 2005 TAC of pollock in Statistical area 630, NMFS is terminating the previous closure and is reopening directed fishing for pollock in Statistical Area 630 of the GOA. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 24 hours. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 630 of the GOA effective 1200 hrs, A.l.t., September 23, 2005.

NMFS closed the directed fishery for pollock in Statistical Area 620 of the GOA under § 679.20(d)(1)(iii) on August 29, 2005 (70 FR 51300, August 30, 2005). NMFS opened directed fishing for pollock in Statistical Area 620 of the GOA for 96 hrs on September 8, 2005 (70 FR 53971, September 13, 2005) and for 96 hrs on September 15, 2005 (70 FR 55305, September 21, 2005).

NMFS has determined that approximately 3,900 mt of pollock remain in the directed fishing allowance for Statistical Area 620 of the GOA. Therefore, in accordance with 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), and to fully utilize the C season allowance of the 2005 TAC of pollock in Statistical area 620, NMFS is terminating the previous closure and is reopening directed fishing for pollock in Statistical Area 620 of the GOA.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of pollock in Statistical Areas 620 and 630 of the GOA. NMFS was unable to publish a an action providing time for public comment because the most recent, relevant data only became available as of September 19, 2005.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by §§ 679.20 and 679.25 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 21, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–19168 Filed 9–21–05; 2:17 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 70, No. 185
Monday, September 26, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 56 and 57

[Docket No. PY–05–003]

RIN 0581–AC47

Update and Clarify a Shell Egg Grading Definition

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) proposes to amend the regulations governing the voluntary shell egg grading program and the regulations governing the inspection of eggs. The proposed revision would revise the definition of washed ungraded eggs in each of the regulations. From time to time, sections in the regulations are affected by changes in egg production and processing technology. This rule updates the regulations to reflect these changes.

DATES: Comments must be received on or before November 25, 2005.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule to David Bowden, Jr., Chief, Standardization Branch, Poultry Programs, Agricultural Marketing Service, U.S. Department of Agriculture, Stop 0259, room 3944—South, 1400 Independence Avenue, SW., Washington, DC 20250. Comments may be faxed to (202) 690–0941. Comments should be submitted in duplicate. Comments may also be submitted electronically to: *AMSPYDockets@usda.gov* or *www.regulations.gov.* All comments should refer to Docket No. PY–05–003 and note the date and page number of this issue of the **Federal Register**. All comments received will be made available for public inspection at the above location during regular business hours. Comments received also will be made available over the Internet in the rulemaking section of the AMS Web site *http://www.ams.usda.gov/rulemaking.* A copy of this proposed rule may be found at: *http://www.ams.usda.gov/poultry/regulations/rulemaking/index.htm.*

FOR FURTHER INFORMATION CONTACT: Charles L. Johnson, Chief, Grading Branch, (202) 720–3271.

SUPPLEMENTARY INFORMATION:

Background and Proposed Changes

AMS administers a voluntary grading program for shell eggs under the Agricultural Marketing Act of 1946, as amended (AMA) (7 U.S.C. 1621 *et seq.*). Any interested party that applies for service must comply with the terms and conditions of the regulations and must pay for the services rendered. AMS graders monitor processing operations and verify the grade and size of eggs packed into packages bearing the USDA grademark. Regulations governing this program are contained in 7 CFR part 56.

AMS also administers a mandatory inspection program for shell eggs under the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). This inspection program ensures that shell eggs sold to consumers contain no more restricted eggs than are permitted in the standards for consumer grades. Regulations governing this program are contained in 7 CFR part 57.

The Agency routinely reviews its regulations to ensure that they are current and up-to-date. The latest review of 7 CFR part 56 and 7 CFR part 57 identified the following changes that are needed to bring the regulations up-to-date with current egg production and processing technology.

Washed Ungraded Eggs

The Agency is proposing to clarify the definition of *washed ungraded eggs* that appears in both regulations. The definitions currently state that washed ungraded eggs mean ''* * * eggs which have been washed but not sized or segregated for quality.'' The revised definitions will state that washed ungraded eggs mean ''* * * eggs which have been washed and that are either sized or unsized, but not segregated for quality.''

In many in-line shell egg production facilities, shell eggs move continuously from a laying house to the processing operation. Frequently, eggs move through washing equipment and are segregated to remove obvious defects (leakers, dirts, etc.) but are not graded or segregated for quality. The resultant shell eggs may no longer be labeled or designated as ''nest-run'' because they have been washed.

Similar to nest-run shell eggs, washed, ungraded, unsized product is not subject to inspection under the EPIA during a shell egg surveillance inspection unless the product is being offered for consumer sale. Washed, ungraded, unsized product, which is not intended for sale to consumers, is sold to official breaking plants or is reprocessed and graded at a shell egg grading facility for consumer sales.

In the early 1990s, Poultry Programs determined that a name designation was needed to reference and label washed, ungraded, unsized shell eggs. Since the product did not meet the criteria for nest-run eggs, Poultry Programs proposed establishing a category of shell eggs known as ''washed ungraded eggs'' to mean eggs that were washed, unsized, and not segregated for quality.

In 1995 through notice and comment rulemaking, Poultry Programs amended the voluntary shell egg regulations at 7 CFR part 56 and defined shell eggs that have been washed but not segregated for grade or size to mean ''washed ungraded eggs''. This definition has worked well; however, as production and processing practices have changed, many in-line shell egg production facilities now segregate washed ungraded eggs by size.

Consequently, the resultant washed, ungraded, sized eggs are not clearly defined by the regulations. The current definition of washed ungraded eggs needs to be revised to include eggs that may either be sized or unsized. This revision will clarify that this product is to be reprocessed and graded and is not intended for sale to consumers.

Since washed ungraded, sized shell eggs do not meet the criteria under the definition of washed ungraded eggs, we propose to revise the definition for washed ungraded eggs to mean eggs that are washed, sized or unsized, but not segregated for quality.

The revision is necessary to facilitate the trading, certification, and identification of shell eggs from processing facilities when shell eggs move from laying houses to processing facilities without being graded.

Executive Order 12866 and Effect on Small Entities

This rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB). In addition, pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), AMS has considered the economic impact of the rule on small entities and has determined that its provisions would not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The Small Business Administration (SBA) (13 CFR 121.201) defines small entities that produce and process chicken eggs as those whose annual receipts are less than $9,000,000. Approximately 625,000 egg laying hens are needed to produce enough eggs to gross $9,000,000.

Currently, the AMA authorizes a voluntary grading program for shell eggs. Shell egg processors that apply for service must pay for the services rendered. Shell egg processors are entitled to pack their eggs in packages bearing the USDA grade shield when AMS graders are present to certify that the eggs meet the grade requirements as labeled. Plants in which these grading services are performed are called official plants. Shell egg processors who do not use USDA's grading service may not use the USDA grademark. There are about 540 shell egg processors registered with the Department that have 3,000 or more laying hens. Of these, 161 are official plants that use USDA's grading service and would be subject to this proposed rule. Of these 161 official plants, 38 meet the small business definition.

The EPIA authorizes the mandatory inspection of egg products operations and the mandatory surveillance of the disposition of shell eggs that are undesirable for human consumption, with implementing regulations in 7 CFR part 57. All of the approximate 540 shell egg processors registered with the Department are required to comply with the labeling provisions of the EPIA and would be subject to this proposed rule. Of these 540 shell egg processors, 313 meet the small business definition.

This proposal will not have an adverse economic impact on processors. It would revise the AMA and the EPIA regulations by up-dating the definition of washed ungraded eggs to reflect current egg production and processing technology.

For the above reasons, the Agency has certified that this action will not have a significant economic impact on a substantial number of small entities.

Executive Orders 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Office of Management and Budget (OMB) has approved the information collection and recordkeeping requirements included in this proposed rule, and there are no new requirements. The assigned OMB control number is 0581–0128.

AMS is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

List of Subjects

7 CFR Part 56

Eggs and egg products, Food grades and standards, Food labeling, Reporting and recordkeeping requirements.

7 CFR Part 57

Eggs and egg products, Exports, Food grades and standards, Food labeling, Imports, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, it is proposed that 7 CFR parts 56 and 57 be amended as follows:

PART 56—VOLUNTARY GRADING OF SHELL EGGS

1. The authority citation for part 56 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

2. In § 56.1, revise the term *Washed ungraded eggs* to read as follows:

§ 56.1 Meaning of words and terms defined.

* * * * *

Washed ungraded eggs means eggs which have been washed and that are either sized or unsized, but not segregated for quality.

PART 57—INSPECTION OF EGGS (EGGS PRODUCTS INSPECTION ACT)

3. The authority citation for part 57 continues to read as follows:

Authority: 21 U.S.C. 1031–1056.

4. In § 57.1, revise the term *Washed ungraded eggs* to read as follows:

§ 57.1 Definitions.

* * * * *

Washed ungraded eggs means eggs which have been washed and that are either sized or unsized, but not segregated for quality.

Dated: September 20, 2005.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. 05–19087 Filed 9–23–05; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–SW–10–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS355E, F, F1, F2, and N Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to revise an existing airworthiness directive (AD) for the specified Eurocopter France (ECF) model helicopters. That AD currently requires certain checks of the magnetic chip detector plug (chip detector) and the main gearbox (MGB) oil-sight glass, certain inspections of the lubrication pump (pump), and replacing the MGB and the pump with an airworthy MGB and pump, if necessary. Also, the AD requires that before an MGB or pump with any time-in-service (TIS) can be installed, it must meet the AD requirements. This action would retain those requirements but would limit the applicability to one part number with certain serial-numbered pumps or modified after a certain date. This proposal was prompted by an investigation by the manufacturer that revealed a malfunction occurred after modifying the pump case on certain pumps after major overhaul and repairs.

The actions specified by this AD are intended to limit the applicability to certain pumps, to detect sludge on the chip detector, to prevent failure of the MGB pump, seizure of the MGB, loss of drive to an engine and main rotor, and subsequent loss of control of the helicopter.

DATES: Comments must be received by November 25, 2005.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2003–SW–10–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov*. Comments may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ed Cuevas, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Safety Management Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5355, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 2003–SW–10–AD.'' The postcard will be date stamped and returned to the commenter.

Discussion

The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on the specified ECF model helicopters. The DGAC advises that the insufficiently lubricated power transmission assembly deteriorates until it causes the loss of the drive train for one or even both engines.

On October 10, 2003, the FAA issued AD 2003–21–09, Docket No. 2003–SW–10–AD, Amendment 39–13344 (68 FR 60284, October 22, 2003), which superseded AD 2002–21–51, Docket No. 2002–SW–48–AD, Amendment 39–12982 (67 FR 77401, December 18, 2002), to require certain checks of the chip detector and the MGB oil-sight glass, certain inspections of the pump, and replacing the MGB and the pump with an airworthy MGB and pump, if necessary. Also, the AD requires that before a MGB or pump with any TIS can be installed, it must meet the AD requirements. That AD corrected the wording from AD 2002–21–51 to specify that a check of the chip detector should be for sludge rather than metal particles. That condition, if not corrected, could result in failure of the MGB pump, seizure of the MGB, loss of drive to an engine and main rotor, and subsequent loss of control of the helicopter.

Since issuing that AD, ECF has issued Alert Service Bulletin No. 05.00.40, dated November 16, 2004 (ASB), which specifies that the effectivity is limited to each pump, part number (P/N) 355A32–0700–01, with a serial number (S/N) equal to or above 5731 and with a S/N below 5731, if they have been overhauled or repaired after June 1, 1995. An investigation revealed that the malfunction is due to a modification to the shape of the pump case. An enlarged opening of the chamber after machining generates additional loads on the pump. The modification was made to the one part-numbered pump with the previously specified serial numbers; therefore, the ASB limits the effectivity to those pumps.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of these type designs that are certificated for operation in the United States.

This previously described unsafe condition is likely to exist or develop on other helicopters of these same type designs. Therefore, the proposed AD would revise AD 2003–SW–10–AD to require the same actions as the existing AD but would limit the applicability to the specified ECF helicopters with a pump, P/N 355A32–0700–01, with a S/N 5731 or higher or with a S/N below 5731 if the pump has been overhauled or repaired after June 1, 1995.

The FAA estimates that this proposed AD would affect 105 helicopters of U.S. registry assuming they all have MGB pumps with applicable S/Ns. The proposed actions would take about:

- 10 minutes to check the chip detector and the MGB oil sight glass,
- 4 work hours to remove the MGB and pump,
- 1 work hour to inspect the pump, and
- 4 work hours to install a serviceable MGB and pump at an average labor rate of $65 per work hour.
- Required parts would cost about $4000 for an overhauled pump and up to $60,000 for an overhauled MGB per helicopter.

The manufacturer has represented to the FAA that the standard warranty applies if failure occurs within the first 2 years and operating time is less than 1000 hours. Based on these figures, we estimate the revised total cost impact of the proposed AD on U.S. operators to be $360,335 per year, assuming replacement of one MGB and pump on one helicopter per year and a daily check on all helicopters for 260 days per year.

Regulatory Findings

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory

Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–13344 (68 FR 60284, October 22, 2003), and by adding a new airworthiness directive (AD), to read as follows:

Eurocopter France: Docket No. 2003–SW–10–AD. Revises AD 2003–21–09, Amendment 39–13344.

Applicability: Model AS355E, F, F1, F2, and N helicopters, with a main gear box (MGB) lubrication pump (pump), part number (P/N) 355A32–0700–01, with a serial number (S/N) 5731 or higher or with a S/N below 5731 if the pump has been overhauled or repaired after June 1, 1995, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the MGB pump, seizure of the MGB, loss of drive to an engine and main rotor, and subsequent loss of control of the helicopter, accomplish the following:

(a) Before the first flight of each day and at intervals not to exceed 10 hours time-in-service (TIS), check the MGB magnetic chip detector plug (chip detector) for any sludge. Also, check for dark oil in the MGB oil-sight glass. An owner/operator (pilot) holding at least a private pilot certificate may perform this visual check and must enter compliance into the aircraft maintenance records in accordance with 14 CFR 43.11 and 91.417(a)(2)(v). ''Sludge'' is a deposit on the chip detector that is typically dark in color and in the form of a film or paste, as compared to metal chips or particles normally found on a chip detector. Sludge may have both metallic or nonmetallic properties, may consist of copper (pinion bearing), magnesium (pump case), and steel (pinion) from the oil pump, and a nonmetallic substance from the chemical breakdown of the oil as it interacts with the metal.

Note 1: Eurocopter France Alert Telex No. 05.00.40R1, dated November 27, 2002, and Alert Service Bulletin No. 05.00.40, dated November 16, 2004, pertain to the subject of this AD.

(b) Before further flight, if any sludge is found on the chip detector, inspect the pump.

(c) Before further flight, if the oil appears dark in color when it is observed through the MGB oil-sight glass, take an oil sample. If the oil taken in the sample is dark or dark purple, before further flight, inspect the pump.

(d) While inspecting the pump, if you find any of the following, replace the MGB and the pump with an airworthy MGB and pump before further flight:

(1) Crank pin play,

(2) Out of round bronze bushing (A of Figure 1),

(3) Offset of the driven gear pinion,

(4) Metal chips, or

(5) Wear (C of Figure 1).

See the following Figure 1:

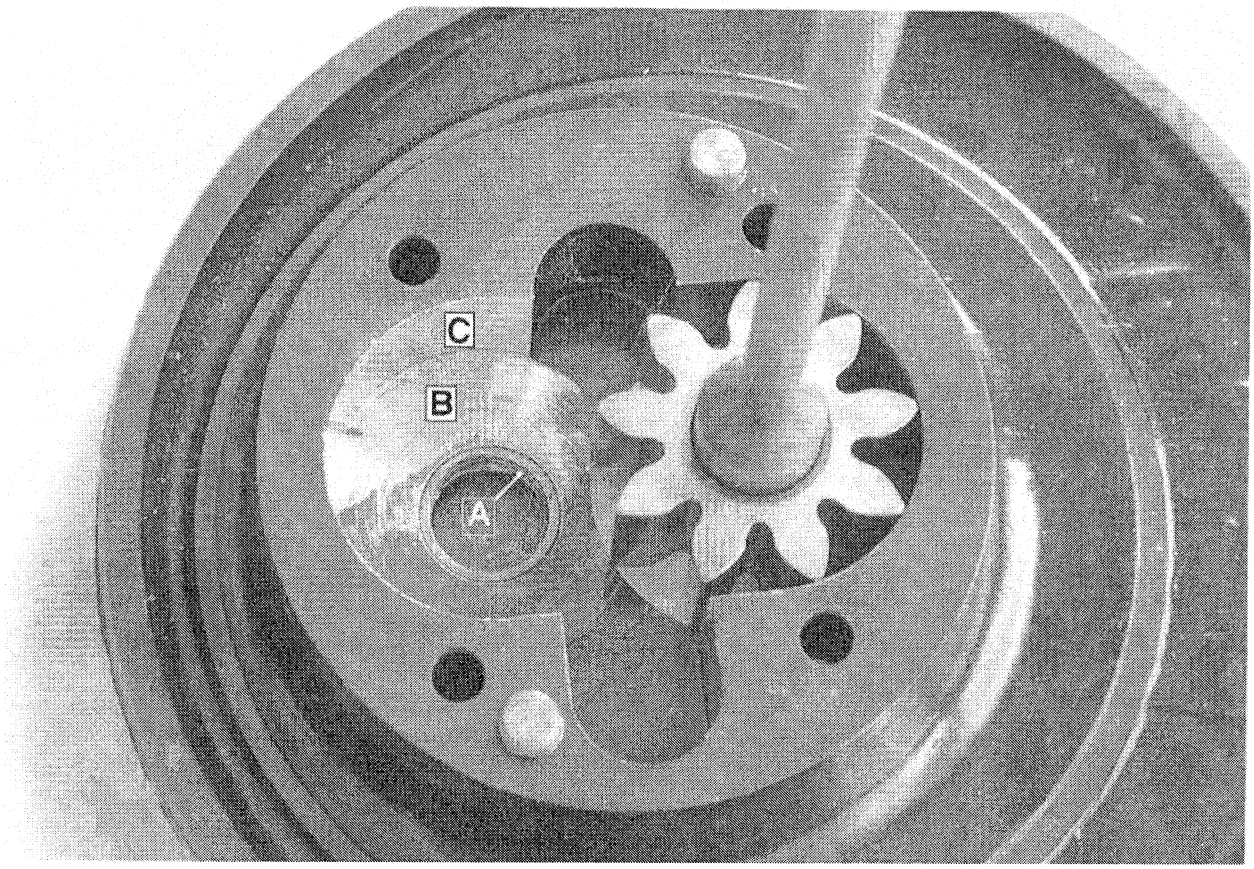

Figure 1

Note 2: If wear is present in the B area only as depicted in Figure 1, replacing the MGB and the pump is not required.

(e) Before installing a different MGB or a pump with any TIS, accomplish the requirements of paragraph (a) of this AD.

(f) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Safety Management Group, Rotorcraft Directorate, FAA, for information about previously approved alternative methods of compliance.

Note 3: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (France) AD 2002–331–071 R2, dated November 24, 2004.

Issued in Fort Worth, Texas, on September 13, 2005.

S. Frances Cox,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 05–19148 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22511; Directorate Identifier 2005–NM–120–AD]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace LP Model Gulfstream 100 Airplanes; and Model Astra SPX, and 1125 Westwind Astra Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Gulfstream Aerospace LP Model Gulfstream 100 airplanes; and Model Astra SPX, and 1125 Westwind Astra airplanes. This proposed AD would require a one-time inspection for discrepancies of the nose wheel steering assembly of the landing gear, installing a warning placard on each nose landing gear door, and corrective action if necessary. This proposed AD is prompted by reports of failure of the steering brackets of the nose wheel steering assembly, and in one incident, loss of steering control. We are proposing this AD to find and fix these discrepancies, which could result in loss of steering control and consequent reduced controllability of the airplane.

DATES: We must receive comments on this proposed AD by October 26, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW, Nassif Building, room PL–401, Washington, DC 20590.
• By fax: (202) 493–2251.
• Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D–25, Savannah, Georgia 31402–2206.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2005–22511; the directorate identifier for this docket is 2005–NM–120–AD.

FOR FURTHER INFORMATION CONTACT: Mike Borfitz, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2677; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2005–22511; Directorate Identifier 2005–NM–120–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of our docket website, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov.*

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

The Civil Aviation Administration of Israel (CAAI), which is the airworthiness authority for Israel, notified us that an unsafe condition may exist on certain Gulfstream Aerospace LP Model Gulfstream 100 airplanes; and Model Astra SPX, and 1125 Westwind Astra series airplanes. The CAAI advises that three operators reported failure of the steering brackets of the nose wheel steering assembly of the landing gear, and in one incident, loss of steering control. Evaluation of the steering brackets revealed that the probable cause of these failures is excessive torsional forces applied to the steering assembly, which can be caused during towing operation of the airplane with the torque links connected. Subsequent to the original reports, similar conditions have been found on other airplanes. This condition, if not corrected, could result in loss of steering control and consequent reduced controllability of the airplane.

Relevant Service Information

Gulfstream Aerospace LP has issued Alert Service Bulletin 100–32A–275, Revision 1, dated December 24, 2003. The service bulletin describes procedures for a nondestructive test inspection for discrepancies of the nose wheel steering assembly of the landing gear, and corrective action if necessary. The discrepancies include cracking of the upper and lower steering brackets and lack of rotation of the centering spring. The corrective action involves replacing both the upper and lower brackets if either bracket is cracked; applying silicone grease to the centering spring mounting shaft and steering bracket mounting hole; and torqueing the nut and verifying free rotation of the centering spring. If no cracking is found, free rotation of the centering spring must be verified before reconnecting the spring; if the centering spring does not rotate, the nut must be backed off until free rotation is obtained.

Gulfstream Aerospace LP has also issued Service Bulletin 1125–11–181, Revision 1, dated December 24, 2003. The service bulletin describes procedures for installing a warning placard on the outside of each nose landing gear door that cautions ground handling crews to use proper towing methods.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

The CAAI mandated the service information and issued Israeli airworthiness directives 32–03–10–05 R1, dated February 8, 2004; and 32–03–12–09, dated February 5, 2004, to ensure the continued airworthiness of these airplanes in Israel.

FAA's Determination and Requirements of the Proposed AD

These airplane models are manufactured in Israel and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAAI has kept the FAA informed of the situation described above. We have examined the CAAI's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Among the Proposed AD, Service Bulletins, and Israeli Airworthiness Directives.''

Differences Among the Proposed AD, Service Bulletins, and Israeli Airworthiness Directives

The applicability of Israeli airworthiness directive 32–03–10–05 R1 identifies Model Gulfstream 100 airplanes; Model Astra SPX and 1125 Westwind Astra airplanes with serial numbers 004, 011 through 147 inclusive, and 149. That airworthiness directive requires a one-time inspection for discrepancies of the nose wheel steering assembly of the landing gear. The applicability of Israeli airworthiness directive 32–03–12–09 identifies Model Astra SPX and 1125 Westwind Astra with serial numbers 004 through 110 inclusive. That airworthiness directive requires installation of warning placards. We have expanded the applicability in this

proposed AD to require that all those airplanes accomplish all the required actions. This requirement would ensure that the actions specified in both of the Israeli airworthiness directives, and required by this proposed AD, are accomplished on all affected airplanes. This difference has been coordinated with the CAAI.

Operators should note that, although the Accomplishment Instructions of the referenced service bulletins describe procedures for submitting a service reply card, this proposed AD would not require that action. We do not need this information from operators.

Costs of Compliance

This proposed AD would affect about 106 airplanes of U.S. registry. The proposed inspection would take about 8 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the proposed AD for U.S. operators is $55,120, or $520 per airplane.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Gulfstream Aerospace LP (Formerly Israel Aircraft Industries, Ltd.): Docket No. FAA–2005–22511; Directorate Identifier 2005–NM–120–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this AD action by October 26, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Gulfstream Aerospace LP Model Gulfstream 100 airplanes; and Model Astra SPX, and 1125 Westwind Astra airplanes; certificated in any category; as identified in Gulfstream Alert Service Bulletin 100–32A–275, and Gulfstream Service Bulletin 1125–11–181, both Revision 1, both dated December 24, 2003.

Unsafe Condition

(d) This AD was prompted by reports of failure of the steering brackets of the nose wheel steering assembly of the landing gear, and in one incident, loss of steering control. We are issuing this AD to find and fix discrepancies of the nose wheel steering assembly which could result in loss of steering control and consequent reduced controllability of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

One-Time Inspection/Corrective Action

(f) Within 50 flight hours or 25 landings after the effective date of this AD, whichever is first: Perform a one-time non-destructive test inspection for discrepancies of the nose wheel steering assembly, install a warning placard on each nose landing gear door, and do any applicable corrective action, by accomplishing all the actions specified in the Accomplishment Instructions of Gulfstream Alert Service Bulletin 100–32A–275, and Gulfstream Service Bulletin 1125–11–181, both Revision 1, both dated December 24, 2003. Any applicable corrective action must be accomplished before further flight in accordance with Alert Service Bulletin 100–32A–275. Although the service bulletins specify to submit certain information to the manufacturer, this AD does not include that requirement.

Alternative Methods of Compliance (AMOCs)

(g) The Manager, International Branch, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Related Information

(h) Israeli airworthiness directives 32–03–10–05 R1, effective February 8, 2004, and 32–03–12–09, effective February 5, 2004, also address the subject of this AD.

Issued in Renton, Washington, on September 16, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19141 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–22510; Directorate Identifier 2004–NM–32–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede two existing airworthiness directives (ADs), one AD applicable to all Boeing Model 747 airplanes and the other AD applicable to certain Boeing Model 747 airplanes. The first AD currently requires repetitive inspections for cracking of the upper skin of the

horizontal stabilizer center section and the rear spar upper chord, and repair if necessary. The other AD currently requires repetitive inspections for cracking of the upper skin of the outboard and center sections of the horizontal stabilizer and the rear spar structure, hinge fittings, terminal fittings, and splice plates; and repair if necessary. This proposed AD would add, for certain airplanes, repetitive inspections for cracking of the outboard and center sections of the horizontal stabilizer and repair if necessary. For certain other airplanes, this proposed AD would add a detailed inspection to determine the type of fasteners, related investigative actions, and repair if necessary. This proposed AD also would revise the compliance times for certain inspections and add alternate inspections for cracking of the upper skin of the center section and rear spar upper chord. This proposed AD is prompted by reports of cracking in the outboard and center section of the aft upper skin of the horizontal stabilizer, the rear spar chord, rear spar web, terminal fittings, and splice plates; and a report of fractured and cracked steel fasteners. We are proposing this AD to detect and correct this cracking, which could lead to reduced structural capability of the outboard and center sections of the horizontal stabilizer and could result in loss of control of the airplane.

DATES: We must receive comments on this proposed AD by November 10, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

FOR FURTHER INFORMATION CONTACT: Nicholas Kusz, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6432; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2005–22510; Directorate Identifier 2004–NM–32–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of our docket web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

On March 11, 2002, we issued AD 2002–06–02, amendment 39–12678 (67 FR 12464, March 19, 2002), for all Boeing Model 747 airplanes. That AD requires repetitive inspections for cracking of the upper skin of the horizontal stabilizer center section and the rear spar upper chord, and repair, if necessary. That AD was prompted by a report of cracking found in the upper skin of the horizontal center section on a Boeing Model 747SR series airplane. We issued that AD to find and fix this cracking, which could lead to reduced structural capability of the horizontal stabilizer center section, and result in the loss of control of the airplane.

On June 18, 2003, we issued AD 2003–13–09, amendment 39–13209 (68 FR 38583, June 30, 2003), for certain Boeing Model 747 airplanes. That AD requires repetitive inspections for cracking of the upper skin of the outboard and center sections of the horizontal stabilizer and the rear spar structure, hinge fittings, terminal fittings, and splice plates; and repair if necessary. That AD was prompted by reports of cracking on Model 747 airplanes in areas not covered by certain inspections required by AD 2002–06–02. We issued AD 2003–13–09 to find and fix this cracking, which could lead to reduced structural capability of the outboard and center sections of the horizontal stabilizer, and result in loss of control of the airplane.

Actions Since Existing ADs Were Issued

The preamble to AD 2003–13–09 explains that we considered the requirements ''interim action'' and were considering further rulemaking action. We now have determined that further rulemaking is indeed necessary, and this proposed AD follows from that determination. Further rulemaking action would supersede AD 2003–13–09 to address the procedures for repetitive inspections of Zone C to find additional cracking, and repair of any cracking found, as described in Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003. That further rulemaking action would also mandate repetitive inspections of Zone B for Groups 4, 5, and 6 airplanes. In addition to superseding AD 2003–13–09, that rulemaking action would also supersede AD 2002–06–02 to mandate long-term inspections of all affected zones specified in the referenced service bulletin for all 747 series airplanes.

Relevant Service Information

We have previously reviewed Boeing Alert Service Bulletin 747–55A2050, dated February 28, 2002. The service bulletin is cited as the appropriate source of service information for accomplishing the requirements of AD 2002–06–02.

We have also previously reviewed Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003. The service bulletin is cited as the appropriate source of service information for accomplishing the Zone A and Zone B inspections required by AD 2003–13–09. The service bulletin

also describes Zone C procedures, which this proposed AD would require for certain airplanes, as follows:

- Do a magnetic inspection to determine if any fastener common to the horizontal stabilizer outboard and center section upper chords at the hinge fitting halves and the splice plate is a Maraging or H–11 steel fastener.
- Do related investigative actions (includes ultrasonic, magnetic particle, or fluorescent particle inspections for any cracked or fractured Maraging or H–11 steel fastener common to the horizontal stabilizer outboard and center section upper chords at the hinge fitting halves and the splice plate). If no crack or fracture is found on a Maraging or H–11 steel fastener, the service bulletin specifies repeating the related investigative and corrective actions, as necessary.
- Do corrective action, if necessary. The corrective action includes performing the Part 4 open hole NDT inspection and replacing the fastener with a new, improved fastener.

Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003, specifies the following repetitive compliance times:

- Zone B NDT inspection for groups 1, 2, and 3: Repeat within 2,400 flight cycles or 13,000 flight hours, whichever comes first.
- Zone B Open hole NDT inspection for groups 1 through 6: Repeat within 8,000 flight cycles or 44,000 flight hours, whichever comes first.
- Zone C ultrasonic inspection of magnetic fasteners for groups 1, 2, and 3: If no crack or fracture is found, repeat within 18 months.

We have determined that accomplishment of the actions specified in the service information will adequately address the unsafe condition.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing this AD, which would supersede AD 2002–06–02 to continue to require repetitive inspections for cracking of the upper skin of the horizontal stabilizer center section and the rear spar upper chord, and repair, if necessary. This proposed AD would also supersede AD 2003–13–09 to continue to require repetitive inspections for cracking of the upper skin of the outboard and center sections of the horizontal stabilizer and the rear spar structure, hinge fittings, terminal fittings, and splice plates; and repair if necessary. This proposed AD also would, for certain airplanes, add repetitive inspections for cracking of the horizontal stabilizer center and outboard section, and repair if necessary. For certain other airplanes, this proposed AD would add a detailed inspection to determine if fasteners are Maraging or H–11 steel fasteners, related investigative actions, and corrective action if necessary. This proposed AD also would revise the compliance times for certain inspections and add alternate high frequency eddy current (HFEC) inspections for cracking of the upper skin of the center section and rear spar upper chord. This proposed AD would require you to use Boeing Alert Service Bulletin 747–55A2050, dated February 28, 2002; and Revision 1, dated May 1, 2003; to perform these actions except as discussed under ''Differences Between the Proposed AD and the Service Bulletins.''

Differences Between the Proposed AD and the Service Bulletins

The service bulletins specifies that you may contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require you to repair those conditions in one of the following ways:

- Using a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the FAA to make those findings.

Revision 1 of the service bulletin allows operators to re-install certain H–11 bolts. However, H–11 bolts are subject to stress corrosion cracking. We have determined that, because of the safety implications and consequences associated with stress corrosion cracking, this proposed AD would require that inconel bolts be installed. This difference has been coordinated with the manufacturer.

Differences in Compliance Time/ Inspections Between the Proposed AD and AD 2002–06–02

Operators should note that AD 2002–06–02 requires repetitive detailed and HFEC inspections, as applicable, at intervals not to exceed 1,000 flight cycles. This interval matches the interval specified in Boeing Alert Service Bulletin 747–55A2050, dated February 28, 2002, which was referenced as the appropriate source of service information for accomplishing the requirements of AD 2002–06–02. However, for the same detailed inspections, this proposed AD would require repetitive inspections, specified as Zone A inspections, at intervals not to exceed 1,000 flight cycles or 5,600 flight hours, whichever occurs first. The interval for Zone A inspections matches the interval specified in Revision 1, dated May 1, 2003, of the service bulletin, which is referenced as the appropriate source of service information for accomplishing the requirements of this proposed AD. We have determined this interval to be appropriate in consideration of the safety implications.

Operators should also note that while AD 2002–06–02 requires doing repetitive detailed and HFEC inspections, as applicable, this proposed AD would require doing repetitive detailed inspections, specified as Zone A inspections, or as an option, doing repetitive HFEC inspections, specified as Zone B inspections. We have determined the Zone A inspections ensure an adequate level of safety for the affected fleet. The Zone B inspections, if done, have a greater repetitive inspection interval.

Differences in Compliance Time Between the Proposed AD and AD 2003–13–09

Operators should note that, for Groups 1, 2, and 3 airplanes, the thresholds specified in AD 2003–13–09 for the Zone B inspections are at the later of the following times: 90 days after the effective date of the AD; or before the accumulation of 27,000 total flight cycles or 117,000 total flight hours, whichever occurs later.

However for the same airplanes, this proposed AD adds additional thresholds specified in paragraph (i)(2) of the proposed AD. The new thresholds match the thresholds specified in Revision 1, dated May 1, 2003, of the service bulletin for airplanes with less than 27,000 flight cycles and 117,000 flight hours. Airplanes which have more than 27,000 flight cycles and 117,000 flight hours should have already done the Zone B inspections in accordance with AD 2003–13–09. We have determined these thresholds to be appropriate in consideration of the safety implications.

Change to Existing AD

This proposed AD would retain certain requirements of AD 2002–06–02. Since AD 2002–06–02 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS FOR AD 2002–06–02

Requirement in AD 2002–06–02	Corresponding requirement in this proposed AD
Paragraph (a)	Paragraph (f).

This proposed AD also would retain certain requirements of AD 2003–13–09. The corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS FOR AD 2003–13–09

Requirement in AD 2003–13–09	Corresponding requirement in this proposed AD
Paragraph (a)	Paragraph (h)
Paragraph (b)	Paragraph (i).

Costs of Compliance

This proposed AD would affect about 1,087 Model 747 airplanes worldwide and would affect about 227 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this proposed AD. The costs for the inspections are per inspection cycle.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Fleet cost
Zone A Detailed Inspection (required by AD 2002–06–02)	8	$65	$520	$118,040
Zone A NDT Inspection, if done	10	65	650	.....
Zone B NDT Inspection (required by AD 2003–13–09 for Groups 1, 2, and 3 airplanes)	8	65	520	.....
Zone B Open-hole NDT Inspection (new proposed action for Groups 3, 4, and 5 airplanes; and for Groups 1, 2, and 3 airplanes, if done)	30	65	1,950	.....
Zone C Maraging or H–11 Steel Fastener Inspection (new proposed action for Groups 1, 2, and 3 airplanes)	8	65	520	.....

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this proposed AD.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing amendment 39–12678 (67 FR 12464, March 19, 2002) and amendment 39–13209 (68 FR 38583, June 30, 2003), and adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2005–22510; Directorate Identifier 2004–NM–32–AD.

Comments Due Date

(a) The Federal Aviation Administration must receive comments on this airworthiness directive (AD) action by November 10, 2005.

Affected ADs

(b) This AD supersedes AD 2002–06–02, amendment 39–12678; and AD 2003–13–09, amendment 39–13209.

Applicability

(c) This AD applies to all Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes; certificated in any category.

Unsafe Condition

(d) This AD was prompted by reports of cracking in the outboard and center section of the aft upper skin of the horizontal stabilizer, the rear spar chord, rear spar web, terminal fittings, and splice plates; and a report of fractured and cracked steel fasteners. We are issuing this AD to detect and correct this cracking, which could lead to reduced structural capability of the outboard and center sections of the horizontal stabilizer and could result in loss of control of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Certain Requirements of AD 2002–06–02: To Be Done in Accordance With New Revision of the Service Bulletin

Repetitive Inspections for Zone A

(f) Before the accumulation of 24,000 total flight cycles, or within 90 days after April 3, 2002 (the effective date of AD 2002–06–02, amendment 39–12678), whichever occurs

later: Except as provided by paragraph (l) of this AD, ''Optional High Frequency Eddy Current (HFEC) Inspections for Zone A,'' do a detailed inspection for cracking of the upper skin of the horizontal stabilizer center section and the rear spar upper chord, in accordance with the Work Instructions and Figure 1 of Boeing Alert Service Bulletin 747–55A2050, dated February 28, 2002; or in accordance with Part 1 of the Work Instructions of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003. (The inspection procedures include a detailed inspection for cracking of the upper horizontal skin and of the vertical and horizontal flanges of the rear spar upper chord.) As of the effective date of this AD, do the detailed inspection in accordance with Part 1 of the Work Instructions of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003. Repeat the detailed inspection thereafter at the times specified in paragraphs (f)(1) and (f)(2) of this AD, as applicable.

Note 1: For the purposes of this AD, a detailed inspection is ''an intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids, such as mirrors, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

(1) For airplanes on which the detailed inspection required by paragraph (a) of AD 2002–06–02 has been done before the effective date of this AD: Within 1,000 flight cycles after the last detailed inspection, do the detailed inspection specified in paragraph (f) of this AD and repeat the detailed inspection specified in paragraph (f) of this AD thereafter at intervals not to exceed 1,000 flight cycles or 5,600 flight hours, whichever comes first.

(2) For airplanes on which the detailed inspection required by paragraph (a) of AD 2002–06–02 has not been done before the effective date of this AD: After accomplishing the initial inspection, repeat the detailed inspection specified in paragraph (f) of this AD thereafter at intervals not to exceed 1,000 flight cycles or 5,600 flight hours, whichever comes first.

Requirements of AD 2003–13–09 With New Compliance Times Required by This AD

Repetitive Inspections for Zone B: Groups 1 Through 3

(g) For Groups 1, 2, and 3 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003: At the time specified in paragraph (h) of this AD, do the Zone B inspections, as required by either paragraph (g)(1) or (g)(2) of this AD, in accordance with the Work Instructions of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003, except as provided by paragraph (n) of this AD. Repeat the applicable inspection at the applicable time specified in Sheet 2 of Figure 1 of the service bulletin.

(1) Do nondestructive test (NDT) inspections for cracking of the upper skin of the outboard and center sections of the horizontal stabilizer and the rear spar structure, hinge fittings, terminal fittings, and splice plates, in accordance with Part 3 of the service bulletin. The inspections include an ultrasonic inspection of the outboard and center sections, rear spar upper chords under the hinge fitting halves, upper skins under the splice plates, and the rear spar webs behind the terminal fittings; a HFEC inspection of the terminal fitting around the fasteners; a low frequency eddy current inspection of the splice plates around the fasteners; a surface HFEC inspection of the rear spar upper chords in the radius area above the terminal fitting and the lower surface of the horizontal flange; and an HFEC inspection of the rear spar webs in the exposed area above the terminal fitting.

(2) In lieu of the inspections specified in paragraph (g)(1) of this AD: Do an alternate open hole HFEC inspection for cracking of the splice plates, terminal fittings, hinge fitting halves, rear spar upper chords, rear spar webs, and upper skins; and replace H–11 bolts with inconel bolts; in accordance with Part 4 of the service bulletin, except as provided by paragraph (n) of this AD.

(h) For Groups 1, 2, and 3 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003: Do the inspections required by paragraph (g) of this AD at the earlier of the times specified in paragraphs (h)(1) and (h)(2) of this AD.

(1) At the later of the times specified in paragraphs (h)(1)(i) and (h)(1)(ii) of this AD.

(i) Before the accumulation of 27,000 total flight cycles or 117,000 total flight hours, whichever is first.

(ii) Within 90 days after July 15, 2003 (the effective date of AD 2003–13–09, amendment 39–13209).

(2) At the applicable times specified in paragraphs (h)(2)(i) and (h)(2)(ii) of this AD.

(i) For Groups 1 and 3 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003: At the latest of the times specified in paragraphs (h)(2)(i)(A) and (h)(2)(i)(B) of this AD.

(A) Before the accumulation of 20,000 total flight cycles or 85,000 total flight hours, whichever is first.

(B) Within 12 months after the effective date of this AD.

(ii) For Group 2 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003: At the latest of the times specified in paragraphs (h)(2)(ii)(A) and (h)(2)(ii)(B) of this AD.

(A) Before the accumulation of 22,000 total flight cycles or 95,000 total flight hours, whichever is first.

(B) Within 12 months after the effective date of this AD.

Additional Requirements of This AD

Repetitive Inspections for Zone B: Groups 4 Through 6

(i) For Groups 4, 5, and 6 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003: At the later of the times specified in paragraphs (i)(1) and (i)(2) of this AD, do the Zone B inspections as specified in paragraph (g)(2) of this AD. Repeat the applicable inspection at the applicable time specified in Sheet 3 of Figure 1 of the service bulletin.

(1) Before the accumulation of 20,000 total flight cycles or 85,000 total flight hours, whichever is first.

(2) Within 12 months after the effective date of this AD.

Repetitive Inspections for Zone C: Groups 1 Through 3

(j) For Groups 1, 2, and 3 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003: Within 18 months after the effective date of this AD, do a detailed inspection to determine if fasteners common to the horizontal stabilizer outboard and center section upper chords at the hinge fitting halves and the splice plates are magnetic, related investigative actions (includes ultrasonic, magnetic particle, or fluorescent particle inspections for any cracked or fractured Maraging or H–11 steel fastener), and corrective actions by accomplishing all the actions specified in Part 5 of the Work Instructions of the service bulletin, except as provided by paragraph (n) of this AD.

(k) If, during the actions required by paragraph (j) of this AD, any fastener is found to be magnetic and is not cracked or fractured, repeat the related investigative actions and corrective actions specified in paragraph (j) of this AD at the time specified in Sheet 4 of Figure 1 of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003.

Optional High Frequency Eddy Current (HFEC) Inspections for Zone A

(l) In lieu of the detailed inspection specified in paragraph (f) of this AD: Do an HFEC inspection for cracking of the upper skin of the horizontal stabilizer center section and the rear spar upper chord, in accordance with Part 2 of the Work Instructions of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003. Repeat the HFEC inspection thereafter at intervals not to exceed 2,700 flight cycles or 15,000 flight hours, whichever comes first.

Repair

(m) If any discrepancy (cracking or damage) is found during any inspection or related investigative action required by paragraphs (f), (g), (i), or (l) of this AD: Before further flight, repair in accordance with the Work Instructions of Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003, except as provided by paragraph (n) of this AD. Where the service bulletin specifies to contact the manufacturer for appropriate action: Before further flight, repair according to a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or according to data meeting the certification basis of the airplane approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of

the airplane, and the approval must specifically refer to this AD.

Parts Installation

(n) As of the effective date of this AD, no person may install any Maraging or H–11 steel fasteners in the locations specified in this AD. Where Boeing Alert Service Bulletin 747–55A2050, Revision 1, dated May 1, 2003, specifies to install H–11 bolts (kept fasteners), this AD requires installation of inconel bolts.

Alternative Methods of Compliance (AMOCs)

(o)(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(3) AMOCs, approved previously per AD 2002–06–02, amendment 39–12678; or AD 2003–13–09, amendment 39–13209; are approved as AMOCs for the corresponding provisions of this AD, for the repaired area only.

Issued in Renton, Washington, on September 16, 2005.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–19142 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL–7974–2]

North Dakota: Final Authorization of State Hazardous Waste Management Program Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to grant Final authorization to the hazardous waste program changes submitted by North Dakota. In the ''Rules'' section of this **Federal Register**, we are authorizing the State's program changes as an immediate final rule without a prior proposed rule because we believe this action as not controversial. Unless we get written comments opposing this authorization during the comment period, the immediate final rule will become effective and the Agency will not take further action on this proposal. If we receive comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect. EPA will address public comments in a later final rule based on this proposal. EPA may not provide further opportunity for comment. Any parties interested in commenting on this action must do so at this time.

DATES: We must receive your comments by October 26, 2005.

ADDRESSES: Submit your comments by one of the following methods: 1. Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments. 2. E-mail: *shurr.kris@epa.gov*. 3. Mail: Kris Shurr, 8P–HW, U.S. EPA, Region 8, 999 18th St, Ste 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139. 4. Hand Delivery or Courier: to Kris Shurr, 8P–HW, U.S. EPA, Region 8, 999 18th St, Ste 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139.

Instructions: Do not submit information that you consider to be CBI or otherwise protected through regulations.gov, or e-mail. The Federal regulations.gov Web site is an ''anonymous access'' system which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

You can view and copy North Dakota's application at the following addresses: NDDH from 9 a.m. to 4 p.m., 1200 Missouri Ave, Bismarck, ND 58504–5264, contact: Curt Erickson, phone number (701) 328–5166 and EPA Region 8, from 8 a.m. to 3 p.m., 999 18th Street, Suite 300, Denver, CO 80202–2466, contact: Kris Shurr, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov*.

FOR FURTHER INFORMATION CONTACT: Kris Shurr, EPA Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, phone number: (303) 312–6139, e-mail: *shurr.kris@epa.gov*.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the ''Rules'' section of this **Federal Register**.

Dated: September 19, 2005.

Robert E. Roberts,

Regional Administrator, Region 8.

[FR Doc. 05–19137 Filed 9–23–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[CG Docket No. 05–231; FCC 05–142]

Closed Captioning of Video Programming; Telecommunications for the Deaf, Inc. Petition for Rulemaking

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission grants a petition for rulemaking and initiates a proceeding to examine the Commission's closed captioning rules. Specifically, the Commission seeks comment on the current status of the Commission's closed captioning rules in ensuring that video programming is accessible to deaf and hard of hearing Americans and whether any revisions should be made to enhance the effectiveness of those rules; and several compliance and quality issues relating to closed captioning that were raised in a Petition for Rulemaking filed by Telecommunications for the Deaf, Inc., (TDI), the National Association of the Deaf, Self Help for Hard of Hearing People, Inc., the Association for Late Deafened Adults, and the Deaf and Hard of Hearing Consumer Advocacy Network.

DATES: Comments are due on or before November 10, 2005. Reply comments are due on or before November 25, 2005. Written comments on the Paperwork Reduction Act (PRA) proposed information collection requirements must be submitted by the general public, Office of Management and Budget (OMB), and other interested parties on or before November 25, 2005.

ADDRESSES: You may submit comments, identified by [docket number and/or rulemaking number], by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Federal Communications Commission's Web Site: *http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.

People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone (202) 418–0539 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. In addition, a copy of any comments on the Paperwork Reduction Act (PRA) information collection requirements contained herein should be submitted to Leslie Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Leslie.Smith@fcc.gov*, and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, via the Internet to *Kristy_L._LaLonde@omb.eop.gov*, or via fax at (202) 395–5167.

FOR FURTHER INFORMATION CONTACT: Amelia Brown, Consumer & Governmental Affairs Bureau, Disability Rights Office at (202) 418–2799 (voice), (202) 418–0597 (TTY), or e-mail at *Amelia.Brown@fcc.gov*. For additional information concerning the Paperwork Reduction Act information collection requirements contained in the document, contact Leslie Smith at (202) 418–0217, or via the Internet at *Leslie.Smith@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Notice of Proposed Rulemaking (*NPRM*), *Closed Captioning of Video Programming; Telecommunications for the Deaf, Inc. Petition for Rulemaking*, CG Docket No. 05–231, FCC 05–142, contains proposed information collection requirements subject to the PRA of 1995, Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507 of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collection requirements contained in this proceeding. This is a summary of the Commission's *NPRM*, FCC 05–142, adopted July 14, 2005, and released July 21, 2005, in CG Docket No. 05–231.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998.

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the website for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, which in this instance is CG Docket No. 05–231. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption in this proceeding, filers must submit two additional copies of each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial mail sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Comments and reply comments must include a short and concise summary of the substantive discussion and questions raised in the *NPRM*. The Commission further directs all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. The Commission strongly encourages that parties track the organization set forth in this *NPRM* in order to facilitate the Commission's internal review process. Comments and reply comments must otherwise comply with § 1.48 of the Commission's rules and all other applicable sections of the Commission's rules. (*See* 47 CFR 1.48).

Pursuant to § 1.1200 of the Commission's rules, 47 CFR 1.1200, this matter shall be treated as a ''permit-but-disclose'' proceeding in which *ex parte* communications are subject to disclosure. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206 (b) of the Commission's rules.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Initial Paperwork Reduction Act of 1995 Analysis

The *NPRM* contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comment are due November 25, 2005. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the

respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506 (c)(4), the Commission we seeks specific comment on how it may ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control Number: 3060–0761.

Title: Section 79.1 Closed Captioning of Video Programming.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Number of Respondents: 12,500 respondents—(11,500 Video Programming Providers and 1,000 complainants)

Number of Responses: 50,950 responses.

Respondents: Individuals or households; business and other for-profit entities; and not-for-profit institutions.

Estimated Time per response: 30 minutes (0.50 hours) to 10 hours.

Frequency of Response: On occasion reporting requirement; recordkeeping; third party disclosure.

Total Annual Burden: 202,215 hours.

Total Annual Costs: $500,000.

Privacy Act Impact Assessment: Yes.

Needs and Uses: On July 21, 2005, the Commission released a Notice of Proposed Rulemaking (*NPRM*), CG Docket No. 05–231, which initiates a rulemaking to examine the current status of the Commission's closed captioning rules (47 CFR 79.1) with the goal of ensuring that video programming is accessible to deaf and hard of hearing Americans. The *NPRM* seeks to determine whether any revisions should be made to enhance the effectiveness of those rules. The *NPRM* seeks comment on establishing standards for the non-technical quality of closed captioning, the potential costs of such standards for programmers and distributors, the availability of competent captioners to meet a non-technical quality standard mandate, and establishing different non-technical quality standards for pre-produced versus live programming. In addition, the *NPRM* seeks comment on whether additional mechanisms and procedures, beyond those already in the Commission's rules, are necessary to prevent technical problems from occurring and to expeditiously remedy any technical problems that do arise. The *NPRM* also seeks comment on video programming distributors' responsibility to monitor and maintain their equipment and signal transmissions, and whether specific mechanisms should be established for monitoring and maintenance. Additionally, the *NPRM* seeks comment on whether to revise the current rule to allow for shorter complaint and response times, what those time frames should be, and whether complainants should be permitted to complain directly to the Commission without complaining to the video programming distributor first. Further, the *NPRM* seeks comment on requiring video programming distributors to file compliance reports as to the amount of closed captioning they provide, and any alternative methods available to verify compliance. The information collection requirements include the proposed requirements contained in the *NPRM.*

Synopsis

The *NPRM* grants a Petition for Rulemaking that was filed by TDI and several organizations representing deaf and hard of hearing consumers and seeks comment on several issues pertaining to closed captioning. The Commission first adopted rules for closed captioning of video programming in 1997. (*See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95–176, Report and Order, 13 FCC Rcd 3272 (August 22, 1997), published at 62 FR 48487, September 16, 1997), (*Closed Captioning Report and Order*).

The closed captioning rules are found at 47 CFR 79.1, and apply to any television broadcast station licensed by the Commission, any multi-channel video programming distributor (MVPD), and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. Examples of MVPDs include cable operators, multi-channel multipoint distribution services, direct broadcast satellite services, television receive-only satellite program distributors, and satellite master antenna television system operators. We note that telephone companies providing video programming to the home are subject to § 79.1 of the Commission's rules.

Non-technical Quality Standards for Closed Captioning. Currently there are no standards for non-technical quality aspects of closed captioning, such as accuracy of transcription, spelling, grammar, punctuation, placement, identification of nonverbal sounds, pop-on or roll-up style, verbatim or edited for reading speed, and type font. The *NPRM* seeks comment on certain aspects of non-technical quality issues, including whether the Commission should establish standards for the non-technical quality of closed captioning; are there non-technical quality issues other than those noted above that the Commission should consider; are there reasons not to set standards for non-technical quality aspects of closed captioning; what would the costs be to programmers and distributors of mandating non-technical quality standards; and does the captioning pool consist of an adequate number of competent captioners to meet a non-technical quality standard mandate. The *NPRM* also seeks comment on whether any non-technical quality standards should be different for pre-produced programs versus live programs. The *NPRM* seeks comment on what would constitute an ''error,'' whether specific allowable error rates should be adopted and, if so, what error rates would be appropriate.

Technical Quality Standards. In the *Closed Captioning Report and Order*, the Commission adopted a ''pass through'' rule to ensure that programming with closed captions is delivered in a complete manner with the belief that the enforcement of this rule, the captioning requirements, and §§ 15.119 and 73.682 of the Commission's rules would ensure the technical quality of captioning. Section 15.119 of the Commission's rules sets forth the closed caption decoder requirements for analog television receivers, and § 73.682 of the Commission's rules sets forth television transmission standards. The ''pass through'' rule requires video programming providers to ''pass through any captioning they receive that is included with the video programming they distribute as long as the captions do not need to be reformatted.'' The *NPRM* seeks comment on the need for additional mechanisms and procedures in addition to the ''pass through'' rule to prevent technical problems from occurring and to expeditiously remedy any technical problems that do arise. Are such mechanisms and procedures warranted? If so, what form should they take? The *NPRM* seeks comment on the kinds of technical problems experienced by consumers as well as distributors.

Monitoring of Captioning. In the *Closed Captioning Report and Order*, the Commission did not establish specific rules or steps that video programming distributors would be required to follow to ensure the delivery of captions and to make sure that the equipment used is working properly. The *NPRM* seeks comment on video programming distributors' responsibility

to monitor and maintain their equipment and signal transmissions. Should distributors have specific mechanisms in place for monitoring and maintenance of captioning? If so, what should these mechanisms consist of? What impact would such mechanisms have on distributors? The *NPRM* also seeks comment on alternate ways to ensure that captioning is delivered intact to consumers. Lastly, the *NPRM* seeks comment on whether distributors are monitoring their programming and advertising materials to ensure that a program advertised to be closed captioned is indeed closed captioned.

Complaint Procedures. The *NPRM* seeks comment on whether the Commission should revise the current rule to allow for shorter complaint and complaint response times. The *NPRM* seeks comment on what those time frames should be, and seeks comment on whether complainants should be permitted to complain directly to the Commission without complaining to the video programming distributor first. If the Commission decides to retain the current complaint process, the *NPRM* seeks comment on whether the filing and response deadlines should be revised.

Accessibility of Contact Information. The *NPRM* seeks comment on whether video programming distributors should be required to post complete contact information on their Web sites, update this information on a routine basis, and provide the information to the FCC for posting on its Web site. The *NPRM* seeks comment on the experiences that deaf and hard of hearing people have had when contacting video programming distributors to complain or ask questions, and seeks comment from distributors regarding their experiences in this area.

Standardized Captioning Complaint Form. The *NPRM* seeks comment on whether a standardized captioning complaint form would be useful.

Fines and Penalties for Failure to Caption. The Commission's *Forfeiture Guidelines* do not contain any specific guidelines regarding forfeitures for violations of the closed captioning rules. The *NPRM* seeks comment on whether the Commission should establish specific per violation forfeiture amounts for non-compliance with the captioning rules, and if so, what those amounts should be. The *NPRM* directs commenters to § 1.80(b) of the Commission's rules for guidance on existing forfeitures for violations of other Commission rules.

Compliance Reports. In the *Closed Captioning Report and Order*, the Commission did not adopt reporting requirements for distributors or require the filing of periodic reports showing compliance with the closed captioning rules. The *NPRM* seeks comment on requiring video programming distributors to file compliance reports as to the amount of closed captioning they provide. The *NPRM* asks if the Commission should require such reports to be filed, and if so, how often should they be filed; how they should be filed; whether the reports should include information relating to new non-exempt programming or only information pertaining to pre-rule non-exempt and Spanish-language programming; and how a reporting requirement would be implemented. In the event the Commission were to impose a reporting requirement for closed captioning, we seek comment on whether distributors would be able to rely on certifications from programmers that the programming contains closed captioning. Are there alternative methods to verify compliance? If a reporting requirement is not imposed, the *NPRM* seeks comment on whether the Commission's rules should be amended to place a greater burden on video programming distributors to ensure that the programming they carry is captioned, regardless of the assurances they receive from programmers.

Use of Electronic Newsroom Technique. The Commission's rules prohibit the major national broadcast networks (*i.e.*, ABC, CBS, Fox and NBC), affiliates of these networks in the top 25 television markets as defined by Nielsen's Designated Market Areas (DMAs), and national nonbroadcast networks serving at least 50% of all homes subscribing to multi-channel video programming services, from counting electronic newsroom-captioned programming towards compliance with the closed captioning rules. The *NPRM* seeks comment on whether to extend the prohibition of counting ENT generated captions to markets beyond the top 25 DMAs. The *NPRM* also seeks comment on whether the rationale that led to the Commission permitting the use of ENT by some distributors, due to ENT's lower cost, is still relevant. Have captioning costs decreased such that little hardship would result if the Commission were to further limit the circumstances under which captions created using electronic newsroom technique would be allowed to count as captioned programming?

Availability of Captioners. The *NPRM* seeks comment on the supply of captioners available for real-time and pre-recorded captioning. The *NPRM* also seeks comment on the number of companies providing closed captioning services, and on the impact that imposing a quality standard, if adopted, will have on the supply of captioners.

Electronic Filing of Exemption Requests. Currently, § 79.1 of the Commission's rules requires that a petition for a full or partial exemption from the closed captioning requirements based on an undue burden must be filed with the Commission in writing, placed on public notice, and permit interested persons to file comments or oppositions to the petition. Due to the nature of this process, the petition itself is generally not available electronically, unless a disk containing an electronic version of the petition is submitted. The *NPRM* seeks comment on requiring electronic filing for petitions for exemption from the Commission's closed captioning rules under the undue burden standard of § 79.1(f) of the Commission's rules. What impact would such a requirement have on entities filing such petitions, as well as on parties, including consumers, wishing to file comments or oppositions to the petition? The *NPRM* seeks comment on whether electronic filing should be mandated or merely allowed, and on whether an electronic filing requirement would reduce the perceived delay in processing such petitions.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *NPRM*. Written public comments are requested on this IRFA. (*See* 5 U.S.C. 603). The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law Number 104–121, Title II, 110 Statute 857 (1996). Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in the item. The Commission will send a copy of this entire *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). *See* 5 U.S.C. 603(a)). In addition, the *NPRM* and the IRFA (or summaries thereof) will be published in the **Federal Register**. (*See* 5 U.S.C. 603(a)).

A. Need For, and Objectives of, the Proposed Rules

We initiate this review relating to closed captioning in response to several compliance and quality issues raised in

a Petition for Rulemaking filed by Telecommunications for the Deaf, Inc., the National Association of the Deaf, Self Help for Hard of Hearing People, Inc., the Association for Late Deafened Adults, and the Deaf and Hard of Hearing Consumer Advocacy Network. This rulemaking proceeding will examine the current status of the Commission's closed captioning rules with the goal of ensuring that video programming is accessible to deaf and hard of hearing Americans. This *NPRM* also serves as a follow-up to the Commission's prior assurances at the time the closed captioning rules were adopted that certain captioning provisions would be reviewed and evaluated at a future date. As described more fully below, this *NPRM* seeks to determine whether any revisions should be made to enhance the effectiveness of those rules. In particular, the *NPRM* seeks comment on establishing standards for the non-technical quality of closed captioning, the potential costs of such standards for programmers and distributors, the availability of competent captioners to meet a non-technical quality standard mandate, and establishing different non-technical quality standards for pre-produced versus live programming. In addition, the *NPRM* seeks comment on whether additional mechanisms and procedures, beyond those already in the Commission's rules, are necessary to prevent technical problems from occurring and to expeditiously remedy any technical problems that do arise. The *NPRM* also seeks comment on video programming distributors' responsibility to monitor and maintain their equipment and signal transmissions, and whether specific mechanisms should be established for monitoring and maintenance. Additionally, the *NPRM* seeks comment on whether to revise the current rule to allow for shorter complaint and response times, what those time frames should be, and whether complainants should be permitted to complain directly to the Commission without complaining to the video programming distributor first. Further, the *NPRM* seeks comment on requiring video programming distributors to file compliance reports as to the amount of closed captioning they provide, and any alternative methods available to verify compliance.

B. Legal Basis

The authority for this *NPRM* is contained in sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 713.

C. Description and Estimate of the Number of Small Entities Impacted

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. (5 U.S.C. 603(b)(3)). The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' (5 U.S.C. 601(6)). In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. (5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**''). A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. (15 U.S.C. 632).

Cable and Other Program Distribution. This category includes among others, cable systems operators, closed circuit television services, direct broadcast satellite services, home satellite dish services, multipoint distribution systems, multichannel multipoint distribution service, satellite master antenna television systems, and subscription television services. The SBA has developed a small business size standard for this census category, which includes all such companies generating $12.5 million or less in revenue annually. (13 CFR 121.201, NAICS code 513220; changed to 517510 in October 2002). According to Census Bureau data for 1997, there were a total of 1,311 firms in this category that had operated for the entire year. (U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 513220 (issued October 2000)). Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies involved herein.

Cable and Other Subscription Programming. Entities in this category ''primarily engag[e] in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.*, limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources.'' (U.S. Census Bureau, ''2002 NAICS Definitions: 515210 Cable and Other Subscription Programming'' (online, July 2005, at *http://www.census.gov*)). The SBA has developed a small business size standard for this category; that size standard is $12.5 million or less in average annual receipts. (13 CFR 121.201, NAICS code 515210; changed from 513210 in October 2002). According to Census Bureau data for 1997, there were 234 firms in this category that operated for the entire year. (U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4, NAICS code 513210 (issued October 2000)). Of these, 188 had annual receipts of under $10 million, and an additional 16 firms had receipts of between $10 million and $24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of Cable and Other Subscription Programming entities increased approximately 44.5 percent from 1997 to 2002. *See* U.S. Census Bureau, 2002 Economic Census, Industry Series: ''Information,'' Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513210 (issued December 2004). The preliminary data indicate that the total number of ''establishments'' increased from 494 to 714. Data related to thenumber of ''firms,'' which takes into account the concept of common ownership or control, and includes employment and receipts numbers, will be issued in late 2005.

Cable System Operators (Rate Regulation Standard). The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. (47 CFR 76.901(e)). The Commission developed this definition based on its

determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, published at 60 FR 10534, February 27, 1995. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. (Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996; based on figures for December 30, 1995). Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies involved herein.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000. (47 U.S.C. 543(m)(2)). The Commission has determined that there are 67,700,000 subscribers in the United States. *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice, DA 01–158 (released January 24, 2001). Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. (47 CFR 76.901(f)). Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. *See* FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice, DA 01–158 (released January 24, 2001). The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934. The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 909(b).

Cable Television Relay Service. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and other Program Distribution, consisting of all such companies having annual receipts of no more than $12.5 million. (13 CFR 121.201, NAICS code 517510). According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year. (U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization)'', Table 4 (issued October 2000)). Of this total, 1,180 firms had annual receipts of $10 million or less, and an additional 52 firms had receipts of $10 million or more but less than $25 million. (U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization)'', Table 4 (issued October 2000)). Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies involved herein.

Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution. (13 CFR 121.201, NAICS code 517510). This definition provides that a small entity is one with $12.5 million or less in annual receipts. (13 CFR 121.201, NAICS code 517510). Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV, and EchoStar Communications Corporation (EchoStar), report annual revenues that are in excess of the threshold for a small business. DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide. *See* Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, FCC 05–13, paragraph 55 (released February 4, 2005) (2005 Cable Competition Report). EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of $12.5 million, and thus does not qualify as a small business. (Rainbow DBS, which provides service under the brand name VOOM, reported an estimated 25,000 subscribers).

The fourth DBS operator, Dominion Video Satellite, Inc. (Dominion), offers religious (Christian) programming and does not report its annual receipts. (Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis). The Commission does not know of any source that provides this information and, thus, we the Commission has no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

Local Multipoint Distribution Service. Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. (*See* Rulemaking to Amend parts 1, 2, 21, and 25 of the Commission's rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, FCC 97–82, 12 FCC Rcd 12545, 12689 through 12690, paragraph 348 (1997), published at 62 FR 23148, April 29, 1997). The auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million

in the three previous calendar years. An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.

The SBA has approved these small business size standards in the context of LMDS auctions. (*See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (January 6, 1998)). There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and Instructional Television Fixed Service. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). (Amendment of parts 21 and 74 of the Commission's rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Report and Order, FCC 95–230, 10 FCC Rcd 9589 and 9593, paragraph 7 (1995), published at 60 FR 36524, July 17, 1995 (MDS Auction R&O)). In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. (47 CFR 21.961(b)(1)). The SBA has approved of this standard. (See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of $40 million size standard for MDS auction)). The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). (Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. See MDS Auction R&O, 10 FCC Rcd 9608, paragraph 34). Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. (47 U.S.C. 309(j)). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for ''other telecommunications'' (annual receipts of $12.5 million or less). See 13 CFR 121.201, NAICS code 517910).

Concerning ITFS, the Commission notes that educational institutions are included in this analysis as small entities.

The term ''small entity'' under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). The Commission does not collect annual revenue data on ITFS licensees. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission tentatively concludes that at least 1,932 ITFS licensees are small businesses.

Open Video Services. Open Video Service (OVS) systems provide subscription services. (*See* 47 U.S.C. 573). The SBA has created a small business size standard for Cable and Other Program Distribution. (13 CFR 121.201, NAICS code 513220 (changed to 517510 in October 2002)). This standard provides that a small entity is one with $12.5 million or less in annual receipts. The Commission has certified approximately 100 OVS operators to serve 75 areas, and some of these are currently providing service. (*See http://www.fcc.gov/csb/ovs/csovscer.html* (current as of June 2004)). Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that those OVS operators remaining might qualify as small businesses that may be affected by the rules and policies proposed herein.

Television Broadcasting. The SBA defines a television broadcasting station as a small business if such station has no more than $12 million in annual receipts. (*See* 13 CFR 121.201, NAICS Code 515120 (adopted October 2002)). Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' (NAICS Code 515120). This category description continues, ''These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.'' Separate census categories pertain to businesses primarily engaged in producing programming. (*See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199). According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of June 26, 2004, about 860 of the 1,270 commercial television stations in the United States have revenues of $12 million or less. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has power to control both.'' 13 CFR 121.103(a)(1). The Commission's estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations (LPTV). (FCC News Release, ''Broadcast Station Totals as of September 30, 2002''). Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

The proposed rules may impose additional reporting or recordkeeping requirements on a number of different entities. For example, the *NPRM* discusses whether video programming distributors should be required to submit reports to the Commission certifying that they are complying with monitoring and maintenance of equipment and signal transmissions. In addition the *NPRM* asks whether video programming distributors should be required to file compliance reports as to the amount of closed captioning they provide. These proposals may impose additional reporting or recordkeeping requirements on entities. The Commission seeks comment on the possible burden these requirements would place on small entities. Also, the Commission seeks comment on whether a special approach toward any possible compliance burdens on small entities might be appropriate.

E. Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities. (5 U.S.C. 603(b)). The Commission seeks comment on whether it should indeed be the responsibility of the video programming distributor to monitor and maintain equipment and signal transmissions and asks if specific mechanisms should be in place and what would be the impact of such mechanisms on distributors. The *NPRM* notes that, alternatively, the National Cable and Telecommunications Association (NCTA) points out that a distributor's responsibilities should not be unduly burdensome and invites comment on this matter. The *NPRM* also proposes providing a standardized captioning complaint form for consumers, which may be a useful tool to those filing complaints. In addition, the *NPRM* discusses allowing consumers to complain to video programming distributors via e-mail, phone or fax, which is aimed at providing easier options for consumers who have concerns regarding captioning problems and seek more immediate redress. The *NPRM* also points out that effective January 1, 2006, all nonexempt new English language programming must be captioned. Video programming distributors and providers will have to caption their programming. Generally, 100% compliance is required; however, particular entities, and under certain circumstances small entities, may be exempt from the captioning requirements if they qualify for an exemption pursuant to § 79.1(d) of the Commission rules, which provides for exempt programs and providers meeting the particular qualifications cited in the rule, and/or if captioning presents an undue burden pursuant to § 79.1(f) of the Commission's rule, which allows parties to file a petition with the Commission requesting an exemption from captioning upon a sufficient showing that captioning would pose significant difficulty or expense.

F. Federal Rules Which Duplicate, Overlap, or Conflict With, the Commission's Proposals

None.

Ordering Clauses

Pursuant to sections 4(i), 303(r) and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 713, this Notice of Proposed Rulemaking is hereby adopted.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 05–19161 Filed 9–23–05; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 050915240–5240–01; I.D. 090905A]

RIN 0648–AS66

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Gulf of Mexico Essential Fish Habitat Amendment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement Generic Amendment 3 to the Fishery Management Plans (FMPs) of the Gulf of Mexico (EFH Amendment 3) prepared by the Gulf of Mexico Fishery Management Council (Council). EFH Amendment 3 would amend each of the seven Council FMPs -shrimp, red drum, reef fish, coastal migratory pelagic resources, coral and coral reefs, stone crab, and spiny lobster- to describe and identify essential fish habitat (EFH); minimize to the extent practicable the adverse effects of fishing on EFH; and encourage conservation and management of EFH. This proposed rule would establish additional habitat areas of particular concern (HAPCs), restrict fishing activities within HAPCs to protect EFH, and require a weak link in bottom trawl gear to protect EFH. The intended effect of this proposed rule is to facilitate long-term protection of EFH and, thus, better conserve and manage fishery resources in the Gulf of Mexico.

DATES: Written comments on the proposed rule must be received no later than 5 p.m., eastern time, on November 10, 2005.

ADDRESSES: You may submit comments on the proposed rule by any of the following methods:

• E-mail: *0648–AS66.Proposed@noaa.gov*. Include in the subject line the following document identifier: 0648–AS66.

• Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

• Mail: Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

• Fax: 727–824–5308; Attention: Peter Hood.

Copies of EFH Amendment 3, which includes a Regulatory Impact Review (RIR) and an Initial Regulatory Flexibility Analyses (IRFA), and the supporting Environmental Impact Statement (EIS) may be obtained from the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: 813–348–1630; fax: 813–348–1711; e-mail: *gulfcouncil@gulfcouncil.org*.

FOR FURTHER INFORMATION CONTACT: Peter Hood, telephone: 727–551–5728, fax: 727–824–5308, e-mail: *peter.hood@noaa.gov*.

SUPPLEMENTARY INFORMATION: EFH Amendment 3 addresses fisheries under the FMPs for coral and coral reef resources, coastal migratory pelagics, red drum, reef fish, shrimp, spiny lobster, and stone crab. The FMPs were prepared by the Council, except for the FMPs for coastal migratory pelagics and spiny lobster that were prepared jointly by the South Atlantic and Gulf of Mexico Fishery Management Councils. All of these FMPs, except the spiny lobster and stone crab FMPs, are implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. The Fishery Management Plan for the Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic is implemented by regulations at 50 CFR part 640. The Fishery Management Plan for the Stone Crab Fishery of the Gulf of Mexico is implemented by regulations at 50 CFR part 654.

Background

In 1998, the Council prepared a generic amendment for the seven Council FMPs to describe and identify EFH, minimize to the extent practicable the adverse effects of fishing on EFH, and encourage the conservation and enhancement of EFH, as required by section 303(a)(7) of the Magnuson-Stevens Act. A coalition of environmental groups subsequently initiated litigation challenging NMFS' approval of the generic amendment. The court found that the environmental assessment for the generic amendment did not comply with the requirements of the National Environmental Policy Act (NEPA) and required NMFS to prepare a more thorough NEPA analysis. Consequently, NMFS entered into a Joint Stipulation with the plaintiff environmental organizations that required the Council to prepare an EIS. NMFS concluded the scope of the EIS should address all required EFH components as described in section 303(a)(7) of the Magnuson-Stevens Act.

To support the required description and identification of EFH and to address adverse fishing impacts on EFH related to all Council-managed fisheries, the Council undertook a detailed, two-year analysis of the physical environment; oceanographic features; estuarine, near shore, and offshore habitats; fishery resources; and marine mammals and protected species in the Gulf of Mexico. This analysis provided the basis for preparation of the EFH EIS addressing the seven Council FMPs. The Council used the EFH EIS as a decision-making tool in developing EFH Amendment 3, which this proposed rule would implement.

Provisions of This Proposed Rule

This proposed rule would: establish new HAPCs; implement restrictions on fishing gear within the HAPCs to protect EFH, including coral reef habitat; and require that any bottom trawl fished in the Gulf EEZ include a weak link in the trawl's tickler chain to minimize damage to EFH. A weak link is defined as a length or section of the tickler chain that has a breaking strength less than the chain itself and is easily seen as such when visually inspected.

The proposed rule would establish new HAPCs for Pulley Ridge off the southwest coast of Florida and for Stetson Bank and McGrail Bank located in the northwestern Gulf of Mexico. The proposed rule would also expand the HAPCs for East Flower Garden Bank and West Flower Garden Bank by 9.56 nm^2 (32.79 km^2) and 13.14 nm^2 (45.07 km^2), respectively. Within these HAPCs, the use of bottom-tending gear (e.g., bottom longlines, bottom trawls, pots, traps, and buoy gear) and bottom anchoring by fishing vessels would be prohibited year-round. The coordinates for these proposed HAPCs are specified in § 622.34 of this proposed rule.

Additional Provisions in EFH Amendment 3

In addition to the measures discussed above, EFH Amendment 3 would describe and identify EFH for the fisheries in each of the Council's seven FMPs. This newly defined EFH consists of areas of higher species density as determined based on the NOAA Gulf of Mexico species atlas and functional relationship analyses for red drum, reef fish, coastal migratory pelagics, shrimp, stone crab, and spiny lobster and based on known distributions for corals. The newly defined EFH would ensure that habitats most important to managed species (i.e., those shallower than 100 fathoms (183 m)) would remain protected as EFH.

EFH Amendment 3 also would identify numerous HAPCs in addition to those described under Provisions of This Proposed Rule above. These areas include: the Florida Middle Grounds; Madison-Swanson Marine Reserve; Tortugas North and South Ecological Reserves; and the individual reefs and banks of the Northwestern Gulf of Mexico (Sonnier Bank, MacNeil Bank, 29 Fathom, Rankin Bright Bank, Geyer Bank, Bouma Bank, Rezak Sidner Bank, Alderice Bank, and Jakkula Bank).

Finally, EFH Amendment 3 would establish an education program for recreational and commercial fishermen regarding protection of coral reefs when using various fishing gears in coral reef areas.

Additional background and rationale for the measures discussed above are contained in EFH Amendment 3, the availability of which was announced in the **Federal Register** (70 FR 54518, September 15, 2005).

Classification

At this time, NMFS has not determined that EFH Amendment 3, which this proposed rule would implement, is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making that determination, NMFS will take into account the data, views, and comments received during the comment period on EFH Amendment 3 and the comment period on this proposed rule.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an IRFA as required by section 603 of the Regulatory Flexibility Act. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A summary of the analysis follows.

This action would identify EFH, identify HAPCs, and establish gear and fishing restrictions to protect these habitats. The purpose of this action is to prevent, minimize, or mitigate adverse fishing impacts to EFH and HAPCs. The

Magnuson-Stevens Act provides the statutory basis for the rule.

No duplicative, overlapping, or conflicting Federal rules have been identified.

Almost all commercial and for-hire fishing operations in the Gulf of Mexico could be affected by the proposed action either through directly altering their gear usage or fishing locations, or indirectly by affecting fishery-wide harvest patterns. These commercial fishing operations include the shrimp, reef fish, spiny lobster, and stone crab fisheries. Participation in multiple fisheries by individual entities is common. Fishing for pelagic species is conducted predominantly near the surface with virtually no impact on bottom habitat; therefore, pelagic fisheries would not be impacted by the effects of the proposed rule. However, operations that fish for both pelagic and bottom species will be captured in the following discussion.

The Small Business Administration (SBA) defines a small business as one that is independently owned and operated and not dominant in its field of operation, and has annual receipts not in excess of $3.5 million in the case of commercial harvesting entities or $6.0 million in the case of for-hire entities, or has fewer than 500 employees in the case of fish processors or fewer than 100 employees in the case of fish dealers.

The number of shrimp vessels operating in the Gulf of Mexico in the Federal shrimp fishery has historically been estimated to be as high as 3,500 to 5,000 vessels, while the number of smaller shrimp boats operating in state waters has been estimated at about 13,000. However, many of these shrimp fishing operations are not currently fishing due to poor economic conditions in the fishery, and less than 3,000 vessels are currently permitted to operate in the Federal fishery. More precise numbers for state vessels are not available. Detailed economic and social information has not been collected from Gulf shrimp fishermen for over 10 years, although a socioeconomic survey of the shrimp fishery is presently underway. The historical estimate of average gross revenues for shrimp vessels is approximately $82,000. Given the economic conditions currently experienced by the fishery, present average revenues are likely substantially less. Although there are several businesses that operate a fleet of shrimp vessels, the actual size and number of such businesses is unknown.

As of October 2003, there were 1,158 active commercial reef fish permits for the Gulf of Mexico. An average vessel is estimated to generate revenues of approximately $65,000. Average revenue performance within the fleet varies, however, depending upon the gear utilized and the area fished, ranging from a low of approximately $24,000 for vertical line vessels fishing in the eastern Gulf to $117,000 for bottom longline vessels fishing Gulf-wide.

In 2001, 2,235 fishermen possessed a spiny lobster trap certificate. Total revenues in the 2001 fishery were approximately $15 million, or an average of less than $7,000 per fisherman. Landings in 2001 were markedly lower than historical performance. Using peak revenues of approximately $30 million in 1999 and the same number of fisherman results in average revenues of less than $14,000 per participant.

From 1985–94, an average of 720 fishing craft operated in the stone crab fishery. Of these craft, an average of 234 were vessels greater than 5.0 net tons (4.5 metric tons), and 486 were smaller boats. More recent estimates are not available. The highest annual total ex-vessel revenues from stone crab landings were registered in 1997 at $31.9 million, or an average of approximately $44,000 per vessel. On the assumption that the majority of harvests are made by the larger vessels, if all landings are attributed to the 234 average participating larger vessels, then the average gross revenue would amount to about $136,427.

As of October 2003, there were 1,552 active for-hire vessel permits in the Gulf of Mexico, encompassing both charter and headboat operations. On average, charter boats are estimated to generate gross revenues ranging from $58,000 in the eastern Gulf to $81,000 in the western Gulf, or an overall average of $64,000. Headboats are estimated to generate gross revenues ranging from $281,000 in the eastern Gulf to $550,000 in the western Gulf, or an overall average of $400,000.

Fish dealers may also be affected by the measures in this proposed amendment to the extent that the measures affect harvests. There are 142 federally permitted dealers in the Gulf region. Average employment information per reef fish dealer is not known. Although dealers and processors are not synonymous entities, total employment in 1997 for reef fish processors in the Southeast was estimated at approximately 700 individuals, both part- and full-time. It is assumed all processors must be dealers, yet a dealer need not be a processor. Further, processing is a much more labor-intensive exercise than dealing. Therefore, given the employment estimate for the processing sector, it is assumed that the average employment within the dealer sector would not surpass the SBA employment benchmark.

Based on the SBA benchmark standards and the gross revenue and employment profiles presented above for the various fisheries, all commercial and for-hire fishing vessels and reef fish dealers potentially affected by the proposed regulations are considered small entities.

None of the measures considered in this amendment would alter existing reporting and recordkeeping requirements. None of the proposed compliance requirements would require additional professional skills.

The proposed rule could directly or indirectly affect all commercial and for-hire entities that operate in the Gulf of Mexico. All of these entities are considered small business entities. The proposed rule will, therefore, affect a substantial number of small entities.

The outcome of ''significant economic impact'' can be ascertained by examining two issues: disproportionality and profitability. The disproportionality question is, do the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? All the vessel operations affected by the proposed rule are considered small business entities, so the issue of disproportionality does not arise.

The profitability question is: Do the regulations significantly reduce profit for a substantial number of small entities? The designation of EFH or HAPCs would not have any direct effect on fishing activity or profits because designation itself does not impose fishing restrictions. The anchoring prohibition would primarily affect vessels using vertical lines over the live coral areas of Pulley Ridge, the East and West Flower Gardens, and the McGrail Bank. Landings data do not provide precise harvest or fishing locations, and the proposed restricted areas generally lie within larger geographical statistical grids. Total harvests from the grid within which Pulley Ridge lies (NMFS Statistical Area 2) accounted for only 3.1 percent of average annual total reef fish harvests from 2000–2002, and, although not quantified, similar results are expected for the other protected areas. Because Pulley Ridge--and, similarly, other protected areas--does not encompass the entirety of the statistical area within which it lies, any harvest reduction attributed to the anchoring restriction would be expected

to be less than the total area contribution.

The prohibition on the use of bottom trawls, bottom longlines, and buoy gear would primarily affect fishermen using these gears in the coral areas of Pulley Ridge, Stetson Bank, and McGrail Bank. As previously stated, the coral areas within Pulley Ridge lie completely within the broader NMFS Statistical Area 2. Logbook data for the entire area show the value of all longline reef fish and shark landings from 2000 through 2003 averaged $662,000, or 4.1 percent of the Gulf-wide total for these species. However, it is not anticipated that these landings and revenues would be removed from the fishery because it is expected that most, if not all, of this fishing effort will relocate to adjacent areas where fishing activity already exceeds that of NMFS Statistical Area 2. This relocation may have some minor, but unquantifiable, effect on fishing costs. Relocation of buoy gear fishing would similarly be expected to affect fishing costs. However, it is unknown how much, if any, buoy gear fishing occurs in the proposed protected areas. Similar effects would be expected regarding Stetson Bank and McGrail Bank.

The prohibition on bottom trawls is not expected to affect fishing behavior because trawl fishermen are expected to currently avoid these areas because shrimp generally are not abundant over coral and the costs associated with gear entanglement and damage are prohibitive to efficient trawling activity.

It is not anticipated that any trap fishermen (fish, lobster, or stone crab) would be impacted by the proposed measures because this gear is not believed to be utilized to any significant degree in the proposed restricted areas.

The requirement for a weak link in the tickler chain of bottom trawls used over all habitats is expected to have minor impacts on gear costs and may reduce harvests and increase costs if gear is lost due to entanglement and link separation. Successful trawling operation encourages the avoidance of entanglements. A weak link may increase this behavior, potentially changing where trawling occurs, costs of operation, and harvest rates. It is not possible, however, to quantify these effects.

Several alternatives were considered to the gear restrictions intended to prevent, minimize, or mitigate adverse fishing impacts on the EFH. The no-action alternative would have eliminated the potential adverse impacts of the proposed actions but would not have achieved the Council's objectives. The second alternative to the gear restrictions would have prohibited bottom trawling over coral reefs, required aluminum doors on trawls, limited the length and deployment rate (number of sets per day) of bottom longline sets on hard bottom, required circle hooks on vertical lines and limited sinker weights, and required buoys on anchors. This alternative would not have sufficiently achieved the Council's objectives for habitat protection and would have contained provisions that were either impractical in terms of conducting an economically viable fishery, e.g. limiting the deployment of gear, or increased the adverse economic impacts to fishery participants over those impacts in the proposed rule.

In addition to the requirements of the second alternative, the third alternative would have limited tickler chains, headropes, and vessel length for trawl vessels, and prohibited trotlines when using traps or pots. Although this alternative would have increased the habitat protection over the second alternative, the adverse economic impacts of the second alternative would not have been reduced.

The fourth alternative would have increased the headrope and vessel length restrictions of the third alternative and prohibited the use of tickler chains on all bottoms; prohibited the use of all traps, pots, bottom longline, and buoy gear on coral reefs; and prohibited the use of anchors on coral. This alternative would have increased the inefficiency of trawl gear and would have resulted in lower catch rates and lower economic returns, thereby increasing the adverse impacts to fishery participants.

The fifth alternative would have prohibited the use of all gear and fishing activities that have adverse impacts on EFH in the EEZ. Although resulting in the greatest protection to the environment, the restrictions of this alternative were greater than the Council believed necessary to achieve the objectives of the action and would have imposed an excessive economic burden on fishery participants.

The final alternative would have established restrictions applicable to fishing over live hard bottom and would have limited the length and deployment rate of bottom longline sets, prohibited trotlines when using traps or pots, prohibited all anchoring, and enacted a seasonal closure for shrimp trawl fishing. The longline and anchoring provisions of this alternative are impractical in terms of conducting an operationally and economically viable fishery, and the longline provisions could reduce the economic efficiency of vessels, thereby increasing adverse economic impacts without clearly demonstrable benefits. Further, a seasonal shrimp trawling closure to protect EFH and HAPCs is difficult to justify given (1) the inability to determine, absent vessel monitoring systems, exactly where fishing effort occurs and (2) the apparent low fishing pressure in the areas that are the most likely candidates for closure. Overall, this alternative would not meet the Council's objectives as well as the proposed rule.

Copies of the IRFA are available (see **ADDRESSES**).

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: September 21, 2005.

John Oliver

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 622.31, paragraph (l) is added to read as follows:

§ 622.31 Prohibited gear and methods.

* * * * *

(l) A bottom trawl that does not have a weak link in the tickler chain may not be used to fish in the Gulf EEZ. For the purposes of this paragraph, a weak link is defined as a length or section of the tickler chain that has a breaking strength less than the chain itself and is easily seen as such when visually inspected.

3. In § 622.34, paragraphs (d) introductory text, (d)(1), and (j) are revised, and paragraphs (r), (s), and (t) are added to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(d) *Tortugas marine reserves HAPC.* The following activities are prohibited within the Tortugas marine reserves HAPC: Fishing for any species and bottom anchoring by fishing vessels.

(1) *EEZ portion of Tortugas North.* The area is bounded by rhumb lines connecting the following points: From point A at 24°40′00″ N. lat., 83°06′00″ W. long. to point B at 24°46′00″ N. lat., 83°06′00″ W. long. to point C at

24°46′00″ N. lat., 83°00′00″ W. long.; thence along the line denoting the seaward limit of Florida's waters, as shown on the current edition of NOAA chart 11434, to point A at 24°40′00″ N. lat., 83°06′00″ W. long.

* * * * *

(j) *West and East Flower Garden Banks HAPC.* The following activities are prohibited year-round in the HAPC: Fishing with a bottom longline, bottom trawl, buoy gear, dredge, pot, or trap and bottom anchoring by fishing vessels.

(1) *West Flower Garden Bank.* West Flower Garden Bank is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	27°55′22.8″	93°53′09.6″
B	27°55′22.8″	93°46′46.0″
C	27°49′03.0″	93°46′46.0″
D	27°49′03.0″	93°53′09.6″
A	27°55′22.8″	93°53′09.6″

(2) *East Flower Garden Bank.* East Flower Garden Bank is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	27°59′14.4″	93°38′58.2″
B	27°59′14.4″	93°34′03.5″
C	27°52′36.5″	93°34′03.5″
D	27°52′36.5″	93°38′58.2″
A	27°59′14.4″	93°38′58.2″

* * * * *

(r) *Pulley Ridge HAPC.* Fishing with a bottom longline, bottom trawl, buoy gear, pot, or trap and bottom anchoring by fishing vessels are prohibited year-round in the area of the HAPC bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	24°58′18″	83°38′33″
B	24°58′18″	83°37′00″
C	24°41′11″	83°37′00″
D	24°40′00″	83°41′22″
E	24°43′55″	83°47′15″
A	24°58′18″	83°38′33″

(s) *Stetson Bank HAPC.* Fishing with a bottom longline, bottom trawl, buoy gear, pot, or trap and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	28°10′38.3″	94°18′36.5″
B	28°10′38.3″	94°17′06.3″
C	28°09′18.6″	94°17′06.3″
D	28°09′18.6″	94°18′36.5″
A	28°10′38.3″	94°18′36.5″

(t) *McGrail Bank HAPC.* Fishing with a bottom longline, bottom trawl, buoy gear, pot, or trap and bottom anchoring by fishing vessels are prohibited year-round in the HAPC, which is bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	27°59′06.0″	92°37′19.2″
B	27°59′06.0″	92°32′17.4″
C	27°55′55.5″	92°32′17.4″
D	27°55′55.5″	92°37′19.2″
A	27°59′06.0″	92°37′19.2″

[FR Doc. 05–19169 Filed 9–23–05; 8:45 am]
BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 70, No. 185
Monday, September 26, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–423–808]

Notice of Extension of Time Limit for Final Results of Administrative Review: Stainless Steel Plate in Coils from Belgium

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: September 26, 2005.

FOR FURTHER INFORMATION CONTACT: Toni Page or Scott Lindsay at (202) 482–1398 or (202) 482–0780, respectively; Office of AD/CVD Operations Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

Statutory Time Limits

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act) requires the Department to issue the final results in an administrative review within 120 days after the date on which the preliminary results were published. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the final results to 180 days from the date of publication of the preliminary results.

Extension of Time Limits for Final Results

On June 3, 2005, the Department published the preliminary results of this administrative review. *See Stainless Steel Plate in Coils from Belgium: Preliminary Results of Antidumping Duty Administrative Review* (70 FR 32573). The current deadline for the final results in this review is October 3, 2005. However, the Department finds that it is not practicable to complete the review within the original time frame because we have requested additional information pertaining to the U.S. sales database and will need time to analyze the response and the parties' comments on this matter. As such, completion of this review is not practicable within the original time limit.

For the reasons noted above, in accordance with sections 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations, the Department is extending the time limit for the completion of the final results until no later than November 30, 2005. This notice is issued and published in accordance with section 751(a)(3)(A) of the Act.

Dated: September 20, 2005.

Barbara E. Tillman,

Acting Deputy Assistant Secretaryfor Import Administration.

[FR Doc. E5–5174 Filed 9–23–05; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 090705C]

Mid-Atlantic Fishery Management Council; Public Hearings; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public scoping meetings, request for comments; correction.

SUMMARY: On September 12, 2005, a notice of public hearings by the Mid-Atlantic Fishery Management Council was announced in the **Federal Register**. That document contained an error in relation to the comment acceptance period under the **DATES** heading. This document corrects that error. All other information remains the same.

DATES: Written comments will be accepted until October 31, 2005.

ADDRESSES: Comments may be submitted through any of the following methods:

- Mail: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904
- Fax: 302–674–5399
- Email: *info@mafmc.org*

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director of the Mid-Atlantic Fishery Management, 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION:

Background

In FR doc. E5–4969, on page 53780 of the September 12, 2005, issue of the **Federal Register**, under the **DATES** heading, the comment acceptance period was listed as November 15, 2005. The correct date for the end of the comment acceptance period should read October 31, 2005. The **DATES** heading of this document reflects the change.

Dated: September 21, 2005.

Emily Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–19166 Filed 9–23–05; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textiles and Textile Products Produced or Manufactured in the Socialist Republic of Vietnam

September 20, 2005.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection.

EFFECTIVE DATE: September 27, 2005.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Bureau of Customs and Border Protection website (http://www.cbp.gov), or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limits for certain categories are being adjusted for swing.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov). Also see 69 FR 57272, published in the **Federal Register** on September 24, 2004.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

September 20, 2005.

Commissioner,

Bureau of Customs and Border Protection, Washington, DC 20229

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on September 20, 2004, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton and man–made fiber textiles and textile products, produced or manufactured in Vietnam and exported during the twelve-month period which began on January 1, 2005 and extends through December 31, 2005.

Effective on September 27, 2005, you are directed to adjust the limits for the following categories, as provided for under the terms of the current bilateral textile agreement between the Governments of the United States and Vietnam:

Category	Restraint limit [1]
200	161,252 kilograms.
301	394,171 kilograms.
332	179,684 dozen pairs.
345	167,923 dozen.
620	8,087,620 square meters.

[1] The limits have not been adjusted to account for any imports exported after December 31, 2004.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 05–19164 Filed 9–23–05; 8:45 am]

BILLING CODE 3510–DS

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Limitations of Duty- and Quota-Free Imports of Apparel Articles Assembled in Beneficiary Sub-Saharan African Countries from Regional and Third-Country Fabric

September 22, 2005.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Publishing the New 12-Month Cap on Duty- and Quota-Free Benefits

EFFECTIVE DATE: October 1, 2005.

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Title I, Section 112(b)(3) of the Trade and Development Act of 2000, as amended by Section 3108 of the Trade Act of 2002 and Section 7(b)(2) of the AGOA Acceleration Act of 2004; Presidential Proclamation 7350 of October 4, 2000 (65 FR 59321); Presidential Proclamation 7626 of November 13, 2002 (67 FR 69459).

Title I of the Trade and Development Act of 2000 (TDA 2000) provides for duty- and quota-free treatment for certain textile and apparel articles imported from designated beneficiary sub-Saharan African countries. Section 112(b)(3) of TDA 2000 provides duty- and quota-free treatment for apparel articles wholly assembled in one or more beneficiary sub-Saharan African countries from fabric wholly formed in one or more beneficiary countries from yarn originating in the U.S. or one or more beneficiary countries. This preferential treatment is also available for apparel articles assembled in one or more lesser-developed beneficiary sub-Saharan African countries, regardless of the country of origin of the fabric used to make such articles. This special rule for lesser-developed countries applies through September 30, 2004. TDA 2000 imposed a quantitative limitation on imports eligible for preferential treatment under these two provisions.

The Trade Act of 2002 amended TDA 2000 to extend preferential treatment to apparel assembled in a beneficiary sub-Saharan African country from components knit-to-shape in a beneficiary country from U.S. or beneficiary country yarns and to apparel formed on seamless knitting machines in a beneficiary country from U.S. or beneficiary country yarns, subject to the quantitative limitation. The Trade Act of 2002 also increased the quantitative limitation but provided that this increase would not apply to apparel imported under the special rule for lesser-developed countries. Section 7(b)(2)(B) of the AGOA Acceleration Act extended the expiration of the quantitative limitations. It also further amended the percentages to be used in calculating the quantitative limitations for each twelve-month period, beginning on October 1, 2003. The AGOA Acceleration Act of 2004 provides that the quantitative limitation for the twelve-month period beginning October 1, 2005 will be an amount not to exceed 5.8735 percent of the aggregate square meter equivalents of all apparel articles imported into the United States in the preceding 12-month period for which data are available. See Section 112(b)(3)(A)(ii)(I) of TDA 2000, as amended by Section 7(b)(2)(B) of the AGOA Acceleration Act. Of this overall amount, apparel imported under the special rule for lesser-developed countries is limited to an amount not to exceed 2.9285 percent of apparel imported into the United States in the preceding 12-month period. See Section 112(b)(3)(B)(ii)(II) of TDA 2000, as amended by Section 7(b)(2)(B) of the AGOA Acceleration Act. For the purpose of this notice, the most recent 12-month period for which data are available is the 12-month period ending July 31, 2005.

Presidential Proclamation 7350 directed CITA to publish the aggregate quantity of imports allowed during each 12-month period in the **Federal Register**. Presidential Proclamation 7626, published on November 18, 2002, modified the aggregate quantity of imports allowed during each 12-month period.

For the one-year period, beginning on October 1, 2005, and extending through September 30, 2006, the aggregate quantity of imports eligible for preferential treatment under these provisions is 1,344,476,567 square meters equivalent. Of this amount, 670,349,813 square meters equivalent is available to apparel imported under the special rule for lesser-developed countries. These quantities will be recalculated for each subsequent year. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

These quantities are calculated using the aggregate square meter equivalents of all apparel articles imported into the United States, derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (ATC), and the conversion factors for units of measure into square meter

equivalents used by the United States in implementing the ATC.

James C. Leonard III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.05–19276 Filed 9–22–05; 1:43 pm]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Limitations of Duty- and Quota-Free Imports of Apparel Articles Assembled in Beneficiary ATPDEA Countries from Regional Country Fabric

September 22, 2005.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Publishing the New 12-Month Cap on Duty and Quota Free Benefits.

EFFECTIVE DATE: October 1, 2005.

FOR FURTHER INFORMATION CONTACT: Richard Stetson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 3103 of the Trade Act of 2002; Presidential Proclamation 7616 of October 31, 2002 (67 FR 67283).

Section 3103 of the Trade Act of 2002 amended the Andean Trade Preference Act (ATPA) to provide for duty and quota-free treatment for certain textile and apparel articles imported from designated Andean Trade Promotion and Drug Eradication Act (ATPDEA) beneficiary countries. Section 204(b)(3)(B)(iii) of the amended ATPA provides duty- and quota-free treatment for certain apparel articles assembled in ATPDEA beneficiary countries from regional fabric and components. More specifically, this provision applies to apparel articles sewn or otherwise assembled in one or more ATPDEA beneficiary countries from fabrics or from fabric components formed or from components knit-to-shape, in one or more ATPDEA beneficiary countries, from yarns wholly formed in the United States or one or more ATPDEA beneficiary countries (including fabrics not formed from yarns, if such fabrics are classifiable under heading 5602 and 5603 of the Harmonized Tariff Schedule (HTS) and are formed in one or more ATPDEA beneficiary countries). Such apparel articles may also contain certain other eligible fabrics, fabric components, or components knit-to-shape.

For the one-year period, beginning on October 1, 2005, and extending through September 30, 2006, preferential tariff treatment is limited under the regional fabric provision to imports of qualifying apparel articles in an amount not to exceed 4.25 percent of the aggregate square meter equivalents of all apparel articles imported into the United States in the preceding 12-month period for which data are available. For the purpose of this notice, the 12-month period for which data are available is the 12-month period that ended July 31, 2005. In Presidential Proclamation 7616, (published in the **Federal Register** on November 5, 2002, 67 FR 67283), the President directed CITA to publish in the Federal Register the aggregate quantity of imports allowed during each 12-month period.

For the one-year period, beginning on October 1, 2005, and extending through September 30, 2006, the aggregate quantity of imports eligible for preferential treatment under the regional fabric provision is 972,848,456 square meters equivalent. This quantity will be recalculated for each subsequent year, under Section 204(b)(3)(B)(iii). Apparel articles entered in excess of this quantity will be subject to otherwise applicable tariffs.

This quantity is calculated using the aggregate square meter equivalents of all apparel articles imported into the United States, derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (ATC), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC.

James C. Leonard, III,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.05–19277 Filed 9–22–05; 1:43 pm]

BILLING CODE 3510–DS–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0069]

Federal Acquisition Regulation; Information Collection; Indirect Cost Rates

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance (9000–0069).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning indirect cost rates. The clearance currently expires on December 31, 2005.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before November 25, 2005.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the General Services Administration, FAR Secretariat (VIR), 1800 F Street, NW, Room 4035, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Jeritta Parnell, Contract Policy Division, GSA (202) 501–4082.

SUPPLEMENTARY INFORMATION:

A. Purpose

The contractor's proposal of final indirect cost rates is necessary for the establishment of rates used to reimburse the contractor for the costs of performing under the contract. The supporting cost data are the cost accounting information normally prepared by organizations under sound management and accounting practices.

The proposal and supporting data is used by the contracting official and auditor to verify and analyze the indirect costs and to determine the final indirect cost rates or to prepare the Government negotiating position if negotiation of the rates is required under the contract terms.

B. Annual Reporting Burden

Respondents: 3,000.

Responses Per Respondent: 1.
Annual Responses: 3,000.
Hours Per Response: 2,188.
Total Burden Hours: 6,564,000.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VIR), Room 4035, 1800 F Street, NW, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0069, Indirect Cost Rates, in all correspondence.

Dated: September 12, 2005.

Julia B. Wise,

Director, Contract Policy Division.

[FR Doc. 05–19156 Filed 9–23–05; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 26, 2005.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Rachel Potter, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: September 20, 2005.

Angela C. Arrington,

Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Revision.
Title: FRSS Distance Education Courses for Public Elementary and Secondary Students: 2004–05.
Frequency: One-time.
Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.
Reporting and Recordkeeping Hour Burden:
Responses: 2,200.
Burden Hours: 1,100.
Abstract: The Quick Response Information System consists of two survey system components—Fast Response Survey System for schools, districts, libraries and the Postsecondary Education Quick Information System for postsecondary institutions. This survey will go to 2200 public elementary and secondary school districts. It will provide current information about the number of enrollments of students in distance education courses, as well as the types of technologies most commonly used for delivering such courses. In addition information will be collected about completions of these courses and offerings of dual credit and advanced placement courses via distance education.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2883. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Katrina Ingalls at her e-mail address *Katrina.Ingalls@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–19120 Filed 9–23–05; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 11, 2005.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. The First Bank of Raymond Employee Stock Ownership Plan, Raymond, Illinois, individually, and as a control group with its trustees, Patricia L. Clarke, Farmersville, Illinois; Larry J. Herron, Girard, Illinois; and Neil T. Jordon, Morrisonville, Illinois, to retain control of Raymond Bancorp, Inc., Raymond, Illinois.

Board of Governors of the Federal Reserve System, September 20, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–19134 Filed 9–23–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*)

(BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 20, 2005.

A. Federal Reserve Bank of New York (Jay Bernstein, Bank Supervision Officer) 33 Liberty Street, New York, New York 10045–0001:

1. The Toronto–Dominion Bank, Toronto, Canada, and TD Banknorth Inc., Portland, Maine; to acquire 100 percent of the voting shares of Hudson United Bancorp, Mahwah, New Jersey.

Board of Governors of the Federal Reserve System, September 20, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 05–19135 Filed 9–23–05; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 11, 2005.

A. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Cornerstone Bancshares, Inc., Hixson, Tennessee; to acquire Eagle Funding, LLC, and thereby indirectly acquire Eagle Financial LLC, both of Chattanooga, Tennessee, and thereby engage in providing factoring services to small businesses and also provide services as a loan broker serving as a facilitator to small businesses to access the national credit markets, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, September 20, 2005.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.05–19133 Filed 9–23–05; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–XXXX]

National Capital Region (NCR), Office of Childcare Services; Information Collection; General Services Administration (GSA) Child Care Specialist Feedback Form

AGENCY: NCR Office of Childcare Services, Public Buildings Service (PBS), GSA.

ACTION: Notice of request for comments regarding a request for a new OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the General Services Administration will be submitting to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement. This information will be used to assess satisfaction with services delivered by staff from the Office of Child Care Services. The respondents are current users of the Office of Child Care Services.

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

DATES: Submit comments on or before: November 25, 2005.

FOR FURTHER INFORMATION CONTACT: Leo G. Bonner, Regional Child Care Coordinator, Office of Child Care Services, at telephone (202) 401–7403 or via e-mail to leo.bonner@gsa.gov.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Regulatory Secretariat (VIR), General Services Administration, Room 4035, 1800 F Street, NW., Washington, DC 20405. Please cite OMB Control No. 3090–XXXX, General Services Administration (GSA) Child Care Specialist Feedback Form, in all correspondence.

SUPPLEMENTARY INFORMATION:

A. Purpose

This information will be used to assess consumer satisfaction with services delivered by staff from the Office of Child Care services.

B. Annual Reporting Burden

Respondents: 144.

Responses Per Respondent: 1.

Hours Per Response: .083 (5 minutes).

Total Burden Hours: 12.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, Washington, DC 20405, telephone (202) 208–7312. Please cite OMB Control No. 3090–XXXX, General Services Administration (GSA) Child Care Specialist Feedback Form, in all correspondence.

Dated: September 2, 2005

Michael W. Carleton,

Chief Information Officer.

[FR Doc. 05–19165 Filed 9–23–05; 8:45 am]

BILLING CODE 6820–A4–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Meeting of the Citizens' Health Care Working Group

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of public meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces meetings of the Citizens' Health Care Working Group (the Working Group) mandated by section 1014 of the Medicare Modernization Act.

DATES: A business meeting of the Working Group will be held on Wednesday, October 5, 2005 from 10:30 a.m. to 5 p.m.

ADDRESSES: The meeting will take place in the Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201 in Room 425–A. The meeting is open to the public.

FOR FURTHER INFORMATION CONTACT: Caroline Taplin, Citizens' Health Care Working Group, at (301) 443–1514 or *ctaplin@ahrq.gov.* If sign language interpretation or other reasonable accommodation for a disability is needed, please contact Mr. Donald L. Inniss, Director, Office of Equal Employment Opportunity Program, Program Support Center, on (301) 443–1144.

The agenda for this Working Group meeting will be available on the Citizens' Working Group Web site, *http://www.citizenshealthcare.gov.* Also available at that site is a roster of Working Group members. When a transcript of the Group's October 5th meeting is completed, it will also be available on the Web site.

SUPPLEMENTARY INFORMATION: Section 1014 of Public Law 108–173, (known as the Medicare Modernization Act) directs the Secretary of the Department of Health and Human Services (DHHS), acting through the Agency for Healthcare Research and Quality, to establish a Citizens' Health Care Working Group (Citizen Group). This statutory provision, codified at 42 U.S.C. 299n., directs the Working Group to: (1) Identify options for changing our health care system so that every American has the ability to obtain quality, affordable health care coverage; (2) provide for a nationwide public debate about improving the health care system; and (3) submit its recommendations to the President and the Congress.

The Citizens' Health Care Working Group is composed of 15 members: The Secretary of DHHS is designated as a member by statute and the Comptroller General of the U.S. Government Accountability Office (GAO) was directed to name the remaining 14 members whose appointments were announced on February 28, 2005.

Working Group Meeting Agenda

The Working Group business meeting on October 5 will be devoted to ongoing Working Group business. Topics to be addressed are expected to include: introductions to Working Group contractors, reports from Working Group Committees, and plans for community meetings and other activities to engage the public.

Submission of Written Information

The Working Group invites written submissions on those topics to be addressed at the Working Group business meeting listed above. In general, individuals or organizations wishing to provide written information for consideration by the Citizens' Health Care Working Group should submit information electronically to *citizenshealth@ahrq.gov.* Since all electronic submissions will be posted on the Working Group Web site, separate submissions by topic will facilitate review of ideas submitted on each topic by the Working Group and the public.

This notice is published less than 15 days in advance of the meeting due to logistical difficulties.

Dated: September 20, 2005.

Carolyn M. Clancy,

Director.

[FR Doc. 05–19171 Filed 9–21–05; 2:46 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–05–0213]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–371–5983 and send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

The National Vital Statistics Report Forms—(OMB No. 0920–0213)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention.

Background and Brief Description: The National Vital Statistics Report Forms project (0920–0213) is an approved collection and compilation of national vital statistics. This collection dates back to the beginning of the 20th century and has been conducted since 1960 by the Division of Vital Statistics of the National Center for Health Statistics, CDC. The collection of the data is authorized by 42 U.S.C. 242k. The National Vital Statistics Report forms provide counts of monthly occurrences of births, deaths, infant deaths, marriages, and divorces. Similar data have been published since 1937 and are the sole source of these data at the national level. The data are used by the Department of Health and Human Services and by other government, academic, and private research and commercial organizations in tracking changes in trends of vital events.

Respondents for the National Vital Statistics Report form (CDC 64.146) are registration officials in each State and Territory, the District of Columbia, and New York City. In addition, 33 local (county) officials in New Mexico who

record marriages occurring in each county of New Mexico will use this form. The data are routinely available in each reporting office as a by-product of ongoing activities. This form is designed to collect counts of monthly occurrences of births, deaths, infant deaths, marriages, and divorces immediately following the month of occurrence. There are no costs to respondents other than their time.

ESTIMATED AVERAGE ANNUAL BURDEN

Respondents to the form: National Vital Statistics Report (CDC 64.146)	Number of respondents	Number of responses/respondent	Average burden/response (in hrs)	Total burden hours
State and Territory registration officials	58	12	12/60	139
New Mexico County marriage registrars	33	12	6/60	40
Total				179

The Annual Marriage and Divorce Occurrence Report form (CDC 64.147) collects final annual counts of marriages and divorces by month for the United States and for each State. The statistical counts requested on this form differ from provisional estimates obtained on the National Vital Statistics Report form in that they represent complete and final counts of marriages, divorces, and annulments occurring during the months of the prior year. These final counts are usually available from State or county officials about eight months after the end of the data year. The data are widely used by government, academic, private research, and commercial organizations in tracking changes in trends of family formation and dissolution.

Respondents for the Annual Marriage and Divorce Occurrence Report form are registration officials in each State, the District of Columbia, New York City, Guam, Puerto Rico, Virgin Islands, Northern Marianas, and American Samoa. The data are routinely available in each reporting office as a by-product of ongoing activities.

ESTIMATED AVERAGE ANNUAL BURDEN

Respondents to the form: annual marriage and divorce occurence report (CDC 64.147)	Number of respondents	Number of responses/respondent	Average burden/response (in hrs)	Total burden (in hrs)
State/Territory/City registration officials	58	1	30/60	29
Total				29

Dated: September 20, 2005.

Joan F. Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–19147 Filed 9–23–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–05–0026]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371–5983 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Report of Verified Case of Tuberculosis (RVCT) (OMB Control No. 0920–0026)—Extension—Centers for Disease Control and Prevention (CDC), National Center for HIV, STD, and TB Prevention (NCHSTP).

Background and Brief Description: CDC is requesting OMB approval for another 3-year extension of the Report of Verified Case of Tuberculosis (RVCT) data collection.

CDC maintains the national TB surveillance system to support CDC's goal of eliminating tuberculosis (TB) in the United States. Previous modifications to the data collection have improved the ability of CDC to monitor important aspects of TB epidemiology in the United States, including drug resistance, TB risk factors, including HIV coinfection, and treatment. The system also enables CDC to monitor the recovery of the nation from the resurgence and identify that current TB epidemiology supports the renewed national goal of elimination. To measure progress in achieving this goal, as well as continue to monitor TB trends and potential TB outbreaks, identify high risk populations for TB, and gauge program performance, CDC is requesting approval to extend the use of the RVCT.

Data are collected by 60 Reporting Areas (50 states, the District of Columbia, New York City, Puerto Rico, and 7 jurisdictions in the Pacific and Caribbean) using the RVCT. There are no changes to the forms previously approved in 2002. An RVCT is completed for each reported TB case and contains demographic, clinical, and laboratory information.

A comprehensive software package, the Tuberculosis Information Management System (TIMS) is currently used for RVCT data entry and electronic transmission of reports to CDC. TIMS provides reports, query functions, and export functions to assist in analysis of the data. However, electronic transmission of TB case reports to CDC is in a transition phase with the development of the web-based National

Electronic Disease Surveillance System (NEDSS) and Public Health Information Network (PHIN). Following the transition, many respondents will implement a PHIN compatible information system to collect and report TB surveillance data via the PHIN Messaging System. The remaining respondents will employ the NEDSS base system. These respondents will be able to use either the associated TB Program Area Module or their own TB surveillance application to collect and report RVCT data to CDC.

CDC publishes an annual report summarizing national TB statistics and also periodically conducts special analyses for publication in peer-reviewed scientific journals to further describe and interpret national TB data. These data assist public health officials and policy makers in program planning, evaluation, and resource allocation. Reporting Areas also review and analyze their RVCT data to monitor local TB trends, evaluate program success, and assist in focusing resources to eliminate TB.

No other Federal agency collects this type of national TB data. In addition to providing technical assistance on the use of RVCT, CDC also provides Reporting Areas with technical support for the TIMS software. In this request, CDC is requesting approval for 7,560 burden hours, a decrease of 780 hours. There are no costs to respondents except for their time. This decrease is due to a decrease in the total number of tuberculosis cases.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Local, state, territorial health departments	60	252	30/60

Dated: September 19, 2005.

Joan Karr,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 05–19150 Filed 9–23–05; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A)) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13, the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: The Health Professions Student Loan (HPSL) and Nursing Student Loan (NSL) Programs: Forms (OMB No. 0915–0044): Extension

The HPSL Program Provides long-term, low-interest loans to students attending schools of medicine, osteopathic medicine, dentistry, veterinary medicine, optometry, podiatric medicine, and pharmacy. The NSL Program provides long-term, low-interest loans to students who attend eligible schools of nursing in programs leading to a diploma in nursing, and an associate degree, a baccalaureate degree, or a graduate degree in nursing. Participating HPSL and NSL schools are responsible for determining eligibility of applicants, making loans, and collecting monies owed by borrowers on their outstanding loans. The deferment form (HRSA form 519) provides the schools with documentation of a borrower's eligibility for deferment. The Annual Operating Report (AOR–HRSA form 501) provides the Federal Government with information from participating and non-participating schools (schools that are no longer granting loans but are required to report and maintain program records, student records, and repayment records until all student loans are repaid in full and all monies due the Federal Government are returned) relating to HPSL and NSL program operations and financial activities.

The estimate of burden is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per responses	Total burden hours
Deferment HRSA–519	3,000	1	3,000	10 min	500
AOR–HRSA–501	977	1	977	4 hrs	3,908
Total Burden	3,977		3,977		4,408

Send comments to Susan G. Queen, Ph.D., HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: September 16, 2005.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. 05–19078 Filed 9–23–05; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Public Law 104–13, the Health Resources and Services Administration (HRSA) will publish periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans, call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project

Outcome Study of National Health Service Corps (NHSC) Chiropractor and Pharmacist Loan Repayment Demonstration Project—New

In 2002, Congress authorized a demonstration project to provide for the participation of chiropractors and pharmacists in the NHSC Loan Repayment Program. This study provides for an evaluation of the demonstration project to determine (1) the manner in which the demonstration project has affected access to primary care services, patient satisfaction, quality of care, and health care services provided for traditionally underserved populations; (2) how the participation of chiropractors and pharmacists in the Loan Repayment Program might affect the designation of health professional shortage areas; and (3) whether adding chiropractors and pharmacists as permanent members of the NHSC would be feasible and would enhance the effectiveness of the NHSC.

The burden estimate is as follows:

Respondents	Number of respondents	Number of responses/respondent	Average burden per response (in hours)	Total burden (in hours)
Clinic Users	3,000	1	.25	750
Chiropractors & Pharmacists	40	1	.50	20
NHSC Site Administrative Personnel	140	1	.50	70
Total	3,180	.....	.....	840

Send comments to Susan G. Queen, PhD., HRSA Reports Clearance Officer, Room 10–33 Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Written comments should be received within 60 days of this notice.

Dated: September 16, 2005.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. 05–19079 Filed 9–23–05; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1605–DR]

Alabama; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Alabama (FEMA–1605–DR), dated August 29, 2005, and related determinations.

DATES: Effective September 18, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Michael Bolch, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Ron Sherman as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19105 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3237–EM]

Alabama; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Alabama (FEMA–3237–EM), dated September 10, 2005, and related determinations.

EFFECTIVE DATES: September 18, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Michael Bolch, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

This action terminates my appointment of Ron Sherman as Federal Coordinating Officer for this emergency.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19106 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3248–EM]

California; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of California (FEMA–3248–EM), dated September 13, 2005, and related determinations.

EFFECTIVE DATES: September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of California, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of California.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Karen E. Armes, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of California to have been affected adversely by this declared emergency:

All 58 counties in the State of California for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19113 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3246–EM]

Connecticut; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Connecticut (FEMA–3246–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President

declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Connecticut, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Connecticut.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Kenneth L. Horak, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Connecticut to have been affected adversely by this declared emergency:

All eight counties in the State of Connecticut for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19111 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3244–EM]

Idaho; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Idaho (FEMA–3244–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Idaho, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Idaho.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, John E. Pennington, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Idaho to have been affected adversely by this declared emergency:

All 44 counties in the State of Idaho for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19109 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3251–EM]

Maryland; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Maryland (FEMA–3251–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal

Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Maryland, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Maryland.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Patricia G. Arcuri, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Maryland to have been affected adversely by this declared emergency:

All 24 counties in the State of Maryland for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19116 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3252–EM]

Massachusetts; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the Commonwealth of Massachusetts (FEMA–3252-EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the Commonwealth of Massachusetts, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the Commonwealth of Massachusetts.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Kenneth L. Horak, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the Commonwealth of Massachusetts to have been affected adversely by this declared emergency:

All 14 counties in the Commonwealth of Massachusetts for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19117 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3242–EM]

Minnesota; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency

Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Minnesota (FEMA–3242–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Minnesota, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Minnesota.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses. Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Janet M. Odeshoo, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Minnesota to have been affected adversely by this declared emergency:

All 87 counties in the State of Minnesota for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19107 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3253–EM]

Montana; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Montana (FEMA–3253–EM), dated September 13, 2005, and related determinations.

EFFECTIVE DATE: September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Montana, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Montana.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Douglas A. Gore, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Montana to have been affected adversely by this declared emergency:

All 56 counties in the State of Montana for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19118 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3245–EM]

Nebraska; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Nebraska (FEMA–3245–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Nebraska, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Nebraska.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Arthur L. Freeman, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Nebraska to have been affected adversely by this declared emergency:

All 93 counties in the State of Nebraska for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19110 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3243–EM]

Nevada; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Nevada (FEMA–3243–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Nevada, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Nevada.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Karen E. Armes, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Nevada to have been affected adversely by this declared emergency:

All 17 counties in the State of Nevada for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public

Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19108 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3254–EM]

North Carolina; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of North Carolina (FEMA–3254–EM), dated September 14, 2005, and related determinations.

DATES: Effective September 14, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 14, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of North Carolina, resulting from Hurricane Ophelia beginning on September 11, 2005, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act). Therefore, I declare that such an emergency exists in the State of North Carolina

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives, protect public health and safety, and property or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program at 75 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Shelley Boone, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of North Carolina to have been affected adversely by this declared emergency:

The counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Cumberland, Currituck, Dare, Duplin, Edgecombe, Gates, Greene, Halifax, Hertford, Hyde, Johnston, Jones, Lenoir, Martin, Nash, New Hanover, North Hampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Pitt, Sampson, Tyrell, Washington, Wayne, and Wilson for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 75 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19119 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3247–EM]

North Dakota; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of North Dakota (FEMA–3247–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of North Dakota, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of North Dakota.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Douglas A. Gore, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of North Dakota to have been affected adversely by this declared emergency:

All 53 counties in the State of North Dakota for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19112 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3250–EM]

Ohio; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Ohio (FEMA–3250–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Ohio, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Ohio.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Janet M. Odeshoo, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Ohio to have been affected adversely by this declared emergency:

All 88 counties in the State of Ohio for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19115 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3249–EM]

Wisconsin; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Wisconsin (FEMA–3249–EM), dated September 13, 2005, and related determinations.

DATES: Effective September 13, 2005.

FOR FURTHER INFORMATION CONTACT: Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated September 13, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in the State of Wisconsin, resulting from the influx of evacuees from states impacted by Hurricane Katrina beginning on August 29, 2005, and continuing, is of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the State of Wisconsin.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives and protect public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program, at 100 percent Federal funding. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that

pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Janet M. Odeshoo, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Wisconsin to have been affected adversely by this declared emergency:

All 72 counties in the State of Wisconsin for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 100 percent Federal funding.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program-Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

[FR Doc. 05–19114 Filed 9–23–05; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2005–20118]

Extension of Agency Information Collection Activity Under OMB Review: Maryland Three Airports: Enhanced Security Procedures at Certain Airports in the Washington, DC Area

AGENCY: Transportation Security Administration (TSA), DHS.

ACTION: Notice.

SUMMARY: This notice announces that TSA has forwarded the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and approval of an extension of the currently approved collection under the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on June 7, 2005, 70 FR 33188.

DATES: Send your comments by October 26, 2005. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Comments may be faxed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: DHS–TSA Desk Officer, at (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Katrina Wawer, Information Collection Specialist, Office of Transportation Security Policy, TSA–9, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to a collection of information, unless it displays a valid OMB control number. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Maryland-3 Airports: Enhanced Security Procedures at Certain Airports in the Washington, DC Area.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0029.

Forms(s): Personal Identification Number Issuance Form.

Affected Public: Private pilots desiring to fly to, from, or between the Maryland-3 Airports.

Abstract: Part 1562 of Title 49 of the Code of Federal Regulations (CFR) requires security measures and air traffic control procedures that will protect important national assets in the Washington, DC area, while allowing the Maryland-3 airports (College Park Airport (CGS), Potomac Airfield (VKX), and Washington Executive/Hyde Field (W32)) to resume flight operations. In compliance, TSA requires that all individuals or entities who seek to fly a general aviation aircraft from, to, or between these three airports submit personal information to TSA and fingerprints for criminal history records check. With this information, the Federal Bureau of Investigation (FBI) can conduct a background investigation to determine whether the applicant can be permitted to fly to, from, or between the Maryland-3 airports. This program was put into effect as a result of the September 11, 2001, terrorist attacks with the intent of creating greater safety for the Washington, DC airspace.

During this process TSA will collect the following information and make the following determinations regarding the applicants:

- Personal information from applicants, including full name, Social Security Number, address, telephone number, date of birth, and airman certificate number. (Provision of a Social Security Number is voluntary, but encouraged.)
- Applicants must submit other information, such as aircraft make/model, Federal Aviation Administration (FAA) Registration number, and the name, telephone number, and signature of the appropriate FAA Flight Standards District Office (FSDO) Official.
- The applicant must submit this information to either the Maryland-3 airport from which the applicant wishes to fly, or directly to TSA. The Personal Information form is available on the TSA Web site at: *http://www.tsa.gov/interweb/assetlibrary/pin_issuance_form.pdf.* Alternately, applicants can visit *http://www.tsa.gov,* click on ''Travelers and Consumers,'' then ''Air Travel,'' then ''General Aviation,'' then ''Maryland Three Airports,'' and finally click ''PIN Issuance Form.''
- Agents of the Metropolitan Washington Airports Authority at Ronald Reagan Washington National Airport will collect each applicant's fingerprints. Applicants must go to this airport to submit their fingerprints.
- The FAA will make a determination whether the applicant's airman credentials are valid and that the holder has not been involved in certain kinds of aviation-related incidents. Applicants must present themselves in person at one of the specified FAA Flight Standards District Offices (FSDO) for this determination. The FBI will check applicants' fingerprints for any linked past criminal history, and the FAA will check its records to determine whether the applicants' records contain any

aviation-related transgressions. Should either the FBI or FAA find discrepancies in an applicant's record, further adjudication will be necessary by TSA.

• When an applicant is satisfactorily vetted, TSA will issue the applicant a Personal Identification Number (PIN) that will permit him/her to fly to, from, or between the Maryland-3 airports.

Number of Respondents: 400.

Estimated Annual Burden Hours: An estimated 1172.7 hours annually.

Issued in Arlington, Virginia, on September 19, 2005.

Lisa S. Dean,

Privacy Officer.

[FR Doc. 05–19090 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 30-day notice of information collection under review: Notice of naturalization oath ceremony; Form N–445.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on June 22, 2005 at 70 FR 36202, allowed for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until October 26, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of currently approved collection.

(2) *Title of the Form/Collection:* Notice of naturalization Oath Ceremony.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–445. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. The information furnished on this form refers to events that may have occurred since the applicant's initial interview and prior to the administration of the oath of allegiance. Several months may elapse between these dates and the information that is provided assists the officer to make and render an appropriate decision on the application.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 650,000 responses at approximately 5 minutes (.083) hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 53,950 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–272–8377.

Dated: September 21, 2005.

Stephen R. Tarragon,

Acting Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–19151 Filed 9–23–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 30-day notice of information collection under review: Registration for classification as refugee; Form I–590.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on June 22, 2005 at 70 FR 36202, allowed for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until October 26, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of curently approved collection.

(2) *Title of the Form/Collection:* Registration for Classification as Refugee.

(3) *Agency form number, if any, and the applicable component of the*

Department of Homeland Security sponsoring the collection: I–590. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. This information collection provides a uniform method for applicants to apply for refugee status and contains the formation needed in order to adjudicate such applications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 140,000 responses at approximately 35 minutes (.583) hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 81,620 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–272–8377.

Dated: September 21, 2005.

Stephen R. Tarragon,

Acting Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–19152 Filed 9–23–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of Existing Collection; Comment Request

ACTION: 60-day notice of information collection under review; application for authorization to issue health care certificates; Form I–905.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until November 25, 2005.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of Form/Collection:* Application for Authorization to Issue Health Care Certificates.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–905. Business and Trade Services. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Not-for-profit institutions. The data collected on this form is used by the USCIS to determine eligibility of an organization to issue certificates to foreign health care workers.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 10 responses at 4 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 40 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–272–8377.

Dated: September 21, 2005.

Stephen R. Tarrgon,

Acting Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–19153 Filed 9–23–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-day notice of information collection under review; application for permission to reapply for admission into the United States after deportation or removal; Form I–212.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until November 25, 2006.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Permission to Reapply

for Admission into the United States after Deportation or Removal.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–212. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. The information furnished on Form I–212 will be used by the USCIS to adjudicate applications filed by aliens requesting consent to reapply for admission to the United States after deportation, removal or departure, as provided under section 212.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 4,200 responses at 2 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 8,400 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Washington, DC 20529; 202–272–8377.

Dated: September 21, 2005.

Stephen R. Tarragon,

Acting Director, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. 05–19155 Filed 9–23–05; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2352–05]

RIN 1615–ZA23

Adjustment of the Immigration Benefit Application Fee Schedule

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This Notice announces that the Department of Homeland Security, U.S. Citizenship and Immigration Services, will increase the fees for immigration benefit applications and petitions to account for cost increases due to inflation. The fee increases will apply to applications or petitions filed on or after October 26, 2005. The average fee increase for inflation is approximately $10 per application or petition. Fees collected from persons filing immigration benefit applications and petitions are deposited into the Immigration Examinations Fee Account and are used to fund the full cost of providing immigration benefits, including the full cost of providing benefits such as asylum and refugee admission for which no fees are assessed.

DATES: This notice is effective October 26, 2005.

FOR FURTHER INFORMATION CONTACT: Paul Schlesinger, Director, Office of Budget, U.S. Citizenship and Immigration Services, 20 Massachusetts Ave., NW., Suite 4052, Washington, DC 20529, telephone (202) 272–1930.

SUPPLEMENTARY INFORMATION:

Under What Legal Authority Does U.S. Citizenship and Immigration Services Have To Charge Fees?

The Immigration and Nationality Act (INA) provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including the costs of providing similar services without charge to asylum applicants and other immigrants. 8 U.S.C. 1356(m). The INA also states that the fees may recover administrative costs as well. *Id.* This revenue remains available to provide immigration and naturalization benefits and the collection, safeguarding, and accounting for fees. *Id.* at 1356(n).

U.S. Citizenship and Immigration Services (USCIS) must also conform to the requirements of the Chief Financial Officers Act of 1990 (CFO Act), Public Law 101–576, 104 Stat. 2838 (1990) (codified at 31 U.S.C. 901–903). Section 205(a)(8) of the CFO Act requires each agency's Chief Financial Officer to ''review, on a biennial basis, the fees, royalties, rents, and other charges imposed by the agency for services and things of value it provides, and make recommendations on revising those charges to reflect costs incurred by it in providing those services and things of value.'' 31 U.S.C. 902(a)(8).

What Federal Cost Accounting and Fee Setting Standards and Guidelines Were Used in Developing These Fee Changes?

The authority provided by section 286(m) of the INA permits USCIS to recover the full costs of providing all immigration adjudication and naturalization services, including those services provided to individuals other than those paying fees. When developing fees for services, USCIS also looks, to the extent applicable, to the cost accounting concepts and standards recommended by the Federal Accounting Standards Advisory Board (FASAB). The FASAB was established in 1990, and its purpose is to recommend accounting standards for the Federal Government. The FASAB defines ''full cost'' to include ''direct and indirect costs that contribute to the output, regardless of funding sources.'' Federal Accounting Standards Advisory Board, Statement of Financial Accounting Standards No. 4: Managerial Cost Accounting Concepts and Standards for the Federal Government 36 (July 31, 1995). To obtain full cost, FASAB identifies various classifications of costs to be included, and recommends various methods of cost assignment. *Id.* at 36–42. Full costs include, but are not limited to, an appropriate share of:

(a) Direct and indirect personnel costs, including salaries and fringe benefits such as medical insurance and retirement;

(b) Physical overhead, consulting, and other indirect costs, including material and supply costs, utilities, insurance, travel and rents or imputed rents on land, buildings, and equipment; and,

(c) Management and supervisory costs.

Full costs are determined based upon the best available records of the agency.

How Is the Processing of Immigration Benefit Applications Funded and Supported?

In 1988, Congress established the Immigration Examination Fee Account (IEFA). *See* 100 Public Law 459, 209, 102 Stat. at 2203. Since 1989, fees deposited into the IEFA have been the primary source of funding for providing immigration and naturalization benefits, and other benefits as directed by Congress. In subsequent legislation, Congress directed that the IEFA fund the cost of asylum processing and other services provided to immigrants at no charge. *See* 101 Public Law 515, 210(d)(2), 104 Stat. at 2121. Consequently, the immigration benefit application fees were increased to recover these additional costs. The current immigration benefit application fees are based on the review conducted in 1997, adjusted for cost of living increases and other factors; the fees were last changed effective April 30, 2004. 69 FR 20528. The current fees also include a $5 per immigration benefit application surcharge to recover information technology and quality assurance costs. This surcharge allows USCIS to improve upon the delivery of

services to its customers such as offering electronic filing for certain immigration benefit applications.

What Is the Authority of USCIS To Adjust Immigration Benefit Application Fees for Inflation by Federal Register Notice?

The authority for adjusting immigration benefit application fees for inflation by **Federal Register** Notice is contained in 8 CFR 103.7(b)(3):

> The fees prescribed in paragraph (b)(1) of this section shall be adjusted annually on or after October 1, 2005, by publication of an inflation adjustment. The inflation adjustment will be announced by notice in the **Federal Register**, and the adjustment shall be a composite of the Federal civilian pay raise assumption and non-pay inflation factor for that fiscal year issued by the Office of Management and Budget for agency use in implementing OMB Circular A–76, weighted by pay and non-pay proportions of total funding for that fiscal year. If Congress enacts a different Federal civilian pay raise percentage than the percentage issued by OMB for Circular A–76, the Department of Homeland Security may adjust the fees, during the current year or a following year to reflect the enacted level. The prescribed fee or charge shall be the amount prescribed in paragraph (b)(1) of this section, plus the latest inflation adjustment, rounded to the nearest $5 increment.

See generally 69 FR 20528 (2004).

Beginning on October 26, 2005, the public should no longer rely on the fee schedule set forth in 8 CFR 103.7(b)(1) as the fees specified in the 103.7(b)(1) schedule do not include the inflation adjustments described in this Notice. The changes to the fees announced in this Notice will appear on the companion instructions to the application/petition forms. In addition, this information will be available to the public on the USCIS Web site at *http://www.uscis.gov*, via an agency information brochure accompanying hard copies of the forms, and by contacting the National Customer Information Center using the toll free number at 1–800–375–5283.

What Is the Basis for the Fee Adjustments for Inflation?

The current fees are adjusted for the fiscal year (FY) 2006 and FY 2007 biennial period by pay (Federal employee payroll and benefits) and non-pay (contracts, utilities, rent, etc.) inflation factors issued by the Office of Management and Budget (OMB) used in implementing OMB Circular A–76 (Performance of Commercial Activities). OMB Circular A–76 publishes the inflation factors used in calculating pay and non-pay increases contained in the President's annual budget request. Since Congress enacted a different federal civilian pay raise percentage than the percentage used in calculating the current fees for the FY 2004 and FY 2005 biennial period, the fees are also adjusted to reflect the congressionally-enacted levels. For example, because the fees were adjusted using a 1.7 percent pay raise factor in FY 2005, whereas Congress enacted a 3.65 percent pay raise factor the fees are raised by the difference, 1.95 percent. *See* 8 CFR 103.7(b)(3). The fees are rounded up or down to the nearest $5 increment consistent with past fee adjustment practices. *Id.* The average fee increase is $10, but the amount varies from $5–$20 relative to the amount of the application/petition fee. Even with the inflationary fee adjustments, the fees collected do not exceed the full cost of providing immigration benefits, including the full cost of providing benefits such as asylum and refugee admission for which no fees are assessed.

The methodology basically has two components: one that accounts for the difference between the enacted and projected inflation levels imbedded in the current fees for the FY 2004 and FY 2005 biennial period, and one that accounts for the projected inflation levels for the FY 2006 and FY 2007 biennial period. As an example of the methodology, an inflationary increase of $6.86 was originally built into the current $315 fee for the Form I–485 (Application to Register Permanent Residence or to Adjust Status) for the FY 2004 and FY 2005 biennial period. Based on the projected pay inflation factors of 2.3 percent (1.7 percent for three-quarters of the 2004 calendar year; 4.1 percent for one-quarter of the 2004 calendar year) and 1.7 percent (entire 2005 calendar year) versus enacted inflation factors of 4.1 percent (entire 2004 calendar year) and 3.65 percent (3.5 percent for three-quarters of the 2005 calendar year; 4.1 percent for one-quarter of the 2005 calendar year) for fiscal years 2004 and 2005, the inflationary increase should have been 3.13 percent, or $9.86. The net difference of $3.00 increases the costs of the Form I–485 from $313.63 to $316.63. However, rounding down to the nearest $5 increment did not change the $315 current fee for the Form I–485. Based on the projected pay inflation factors of 2.8 percent (2.6 percent for three-quarters of the calendar year; 3.5 percent for one-quarter of the calendar year) and 2.6 percent (entire calendar year) for fiscal years 2006 and 2007, the inflationary increase is $10.25. This increases the costs of the Form I–485 from $315 to $325.25. Rounding down to the nearest $5 increment raises the fee by $10, from $315 to $325. The total fee increase is $10.

As stated previously, the size of the fee increase varies relative to the amount of the application/petition fee. However, rounding discrepancies account for exceptions to this general rule. For example, even though the current fee for the Form I–193 (Application for Waiver of Passport and/or Visa) is smaller than the Form I–485 fee, the fee increase is greater. This is because the Form I–193 was rounding up to the nearest $5 increment and the Form I–485 was rounding down to the nearest $5 increment. An inflationary increase of $5.25 was originally built into the current $250 fee for the Form I–193 for the FY 2004 and 2005 biennial period. Based on the projected pay inflation factors of 2.3 percent (1.7 percent for three-quarters of the calendar year; 4.1 percent for one-quarter of the calendar year) and 1.7 percent (entire calendar year) versus enacted inflation factors of 4.1 percent (entire calendar year) and 3.65 percent (3.5 percent for three-quarters of the calendar year; 4.1 percent for one-quarter of the calendar year) for fiscal years 2004 and 2005, the actual inflationary increase is $7.54. The net difference of $2.30 increases the costs of the Form I–193 from $252.02 to $254.31. In this case, rounding up to the nearest $5 increment increased the current fee for the Form I–193 from $250 to $255. Based on the projected pay inflation factors of 2.8 percent (2.6 percent for three-quarters of the calendar year; 3.5 percent for one-quarter of the calendar year) and 2.6 percent (entire calendar year) for fiscal years 2006 and 2007, the inflationary increase is $8.30. This increases the costs of the Form I–193 from $255 to $263.30. Rounding up to the nearest $5 increment raises the fee by $10, from $255 to $265. The total fee increase is $15.

Besides the normal payroll increases mandated for government employees each year, inflation-based cost increases have appeared in significant non-payroll items such as rent, physical security, investment technology, and contracts. More specifically, USCIS has observed cost increases due to inflation in some of its largest contracts including those for Service Center operations, adjudications clerical support, Application Support Centers, card production facilities, the National Records Center, the National Benefits Center, and the National Customer Service Center.

What Are the New Application Fees and How Do the New Fees Compare to the Current Fees?

The new immigration benefit application fees and their dollar differences are displayed in Table 1.

TABLE 1.—CURRENT VERSUS NEW APPLICATION AND PETITION FEES

Form No.	Description	New fee	Current fee	Change
I–90	Application to Replace Permanent Resident Card	$190	$185	$5
I–102	Application for Replacement/Initial Nonimmigrant Arrival/Departure Record	160	155	5
I–129	Petition for a Nonimmigrant Worker	190	185	5
I–129F	Petition for Alien Fiancé(e)	170	165	5
I–130	Petition for Alien Relative	190	185	5
I–131	Application for Travel Document	170	165	5
I–140	Immigrant Petition for Alien Worker	195	190	5
I–191	Application for Permission to Return to an Unrelinquished Domicile	265	250	15
I–192	Application for Advance Permission to Enter as a Nonimmigrant	265	250	15
I–193	Application for Waiver of Passport and/or Visa	265	250	15
I–212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal.	265	250	15
I–360	Petition for Amerasian, Widow(er), or Special Immigrant	190	185	5
I–485	Application to Register Permanent Residence or to Adjust Status	[1]325	315	10
I–526	Immigrant Petition by Alien Entrepreneur	480	465	15
I–539	Application to Extend/Change Nonimmigrant Status	200	195	5
I–600/600A	Petition to Classify Orphan as an Immediate Relative/Application for Advance Processing or Orphan Petition.	545	525	20
I–601	Application for Waiver on Grounds of Excludability	265	250	15
I–612	Application for Waiver of the Foreign Residence Requirement	265	250	15
I–687	For Filing Application for Status as a Temporary Resident	[2]255	240	15
I–690	Application for Waiver of Excludability	95	90	5
I–694	Notice of Appeal of Decision	110	105	5
I–698	Application to Adjust Status from Temporary to Permanent Resident	[3]180	175	5
I–751	Petition to Remove the Conditions on Residence	205	200	5
I–765	Application for Employment Authorization	180	175	5
I–817	Application for Family Unity Benefits	200	195	5
I–824	Application for Action on an Approved Application or Petition	200	195	5
I–829	Petition by Entrepreneur to Remove Conditions	475	455	20
I–881	NACARA—Suspension of Deportation or Application for Special Rule Cancellation of Removal.	[4]285	275	10
I–914	Application for T Nonimmigrant Status	[5]270	255	15
N–300	Application to File Declaration of Intention	120	115	5
N–336	Request for Hearing on a Decision in Naturalization Procedures	265	250	15
N–400	Application for Naturalization	330	320	10
N–470	Application to Preserve Residence for Naturalization Purposes	155	150	5
N–565	Application for Replacement Naturalization Citizenship Document	220	210	10
N–600	Application for Certification of Citizenship	255	240	15
N–600K	Application for Citizenship and Issuance of Certificate under Section 322	[6]255	240	15

[1] 225 for an applicant under the age of 14 years (a $10 increase from the current $215). *See* 8 CFR 103.7(b)(1).

[2] A fee of $255 for each application or $120 for each application for a minor child (under 18 years of age) is required at the time of filing with the Department of Homeland Security. The maximum amount payable by a family (husband, wife, and any minor children) shall be $630. *See* 8 CFR 103.7(b)(1).

[3] For applicants filing within 31 months from the date of adjustment to temporary resident status, a fee of $140 for each application is required at the time of filing with the Department of Homeland Security. The maximum amount payable by a family (husband, wife, and any minor children (under 18 years of age living at home) shall be $420. For applicants filing after 31 months from the date of approval of temporary resident status, who file their applications on or after July 9, 1991, a fee of $180 (a maximum of $540 per family) is required. *See* 8 CFR 103.7(b)(1).

[4] $285 for adjudication by the Department of Homeland Security, except that the maximum amount payable by family members (related as husband, wife, unmarried child under 21, unmarried son, or unmarried daughter) who submit applications at the same time shall be $570. $165 for adjudication by the Immigration Court (a single fee of $165 will be charged whenever applications are filed by two or more aliens in the same proceedings). *See* 8 CFR 103.7(b)(1).

[5] For each immediate family member included on the same application, an additional fee of $120 per person, up to a maximum amount payable per application of $540. *See* 8 CFR 103.7(b)(1).

[6] $215 for an application filed on behalf of an adopted child. 8 CFR 103.7(b)(1).

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995), all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a regulatory action. This Notice does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. Appropriate paperwork will be filed with OMB to reflect the change in the annual public cost for each information collection.

Dated: September 21, 2005.

Robert C. Divine,

Acting Deputy Director, U.S. Citizenship and Immigration Services.

[FR Doc. 05–19226 Filed 9–23–05; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Request for Public Comments on Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

A request extending the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the USGS Clearance Officer at the phone number listed below. OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days; therefore, public comments should be submitted to OMB within 30 days in order to assure their maximum consideration. Address your comments and suggestions on the information collection requirement by either fax (202) 395–6566 or e-mail (*oira_docket@omb. eop. gov*) to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Department of the Interior (OMB Control Number 1028–0053). Send copies of your comments and suggestions to the USGS Clearance Officer, U.S. Geological Survey, 807 National Center, Reston, VA 20192, or e-mail (*jcordyac@usgs.gov*). As required by OMB regulations at CFR 1320.8(d)(1), the U.S. Geological Survey solicits specific public comments regarding the proposed information collection as to:

1. Whether the collection of information is necessary for the proper performance of the functions of the USGS, including whether the information will have practical utility;

2. The accuracy of the USGS estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. The utility, quality, and clarity of the information to be collected; and,

4. How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Title: Nonferrous Metals Surveys.

Current OMB Approval Number: 1028–0053.

Abstract: Respondents supply the U.S. Geological Survey with domestic production and consumption data on nonferrous and related metals, some of which are considered strategic and critical. This information will be published as chapters in Minerals Yearbooks, monthly/quarterly Mineral Industry Surveys, annual Mineral Commodity Summaries, and special publications, for use by Government agencies, industry, education programs, and the general public.

Bureau Form Number: Various (32 forms).

Frequency: Monthly, Quarterly, and Annually.

Description of Respondents: Producers and Consumers of nonferrous and related metals.

Annual Responses: 5,466.

Annual Burden Hours: 3,968.

Bureau Clearance Officer: John E. Cordyack, Jr., 703–648–7313.

John H. DeYoung, Jr.,

Chief Scientist, Minerals Information Team.

[FR Doc. 05–19074 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–Y7–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–310–0777–XG]

Notice of Public Meeting: Northwest California Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 (FLPMA), and the Federal Advisory Committee Act of 1972 (FACA), the U. S. Department of the Interior, Bureau of Land Management (BLM) Northwest California Resource Advisory Council will meet as indicated below.

DATES: The meeting will be held Wednesday and Thursday, Oct. 19 and 20, 2005, in Arcata, California. On Oct. 19, the council members convene at 10 a.m. at the BLM Arcata Field Office, 1695 Heindon Rd., and depart immediately for a field tour of public lands managed by the Arcata Field Office. Members of the public are welcome on the tour, but they must provide their own transportation and lunch. On Oct. 20, the council convenes at 8 a.m. in the Conference Center of the Hotel Arcata, 708 Ninth St., Arcata. Time for public comment has been set aside for 1 p.m, Thursday, Oct. 20.

FOR FURTHER INFORMATION CONTACT: Rich Burns, BLM Ukiah Field Office manager, (707) 468–4000; or BLM Public Affairs Officer Joseph J. Fontana, (530) 252–5332.

SUPPLEMENTARY INFORMATION: The 12-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Northwest California. At this meeting, agenda topics will include the Ukiah Resource Management Plan, an update on the California Coastal National Monument Resource Management Plan, a status report on the proposed Sacramento River Bend National Recreation Area and a report on special recreation use permits. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation and lunch. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: Sept. 19, 2005.

Joseph J. Fontana,

Public Affairs Officer.

[FR Doc. 05–19099 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–160.95–1310–DU]

Notice of Intent To Prepare an Amendment to the Caliente Resource Management Plan Regarding Bureau of Land Management Administration of Newly Transferred Lands at Naval Petroleum Reserve #2 (NPR–2) in Kern County, CA

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: Notice of Intent to Amend the Caliente Resource Management Plan to provide for management of lands by BLM on newly transferred lands at the Naval Petroleum Reserve #2 (NPR–2) in Kern County, California.

SUMMARY: The Bureau of Land Management (BLM) proposes to amend the Caliente Resource Management Plan (RMP) to cover newly transferred lands at NPR–2 and prepare an environmental assessment to analyze the effects of that action. The lands addressed by this amendment were formerly under the

jurisdiction of the Department of Energy. However, the Energy Policy Act of 2005 (hereinafter referred to as the Act) transferred management responsibility from the DOE to the BLM effective August 8, 2005. As directed in the Act, ''the principal purpose of the lands subject to transfer * * * is the production of hydrocarbon resources, and the Secretary of the Interior shall manage the lands in a fashion consistent with this purpose.'' Accordingly, this plan amendment will specify management prescriptions at NPR–2 for oil and gas related operations and specific realty actions covered under 43 CFR part 2000 by extending existing management prescriptions from the current Caliente RMP.

The proposed action identifies the suitability of the newly transferred lands for leasing for oil and gas exploration and development and any constraints thereon, in addition to addressing both ongoing and new oil and gas related activities on lands that are already leased. The amendment will also identify guidance for specific realty program actions, including any constraints on repositioning land through exchange, sale or acquisition. The land affected comprises only the federal portion of NPR–2. Total acreage is approximately 10,451 acres, located in Townships 31 South, Ranges 23–24 East; and 32 South, Ranges 23–25 East, MDBM. Approximately 7,919 acres, 76% of the transferred land, already contain ongoing oil and gas operations and little change is expected in those areas. Approximately 2,532 acres, or 24% of the transferred land, is unleased.

DATES: The publication of this notice initiates the public scoping process. Public comments concerning the scope of the draft RMP amendment for NPR–2 should be submitted within 30 days of the date of publication of this notice in the **Federal Register**. Comments are requested on potential issues, alternatives, as well as any suggested planning criteria that BLM should use to guide the plan amendment process.

Public Participation: Public input will be accepted throughout the preparation period. If sufficient interest exists, an open house will be held at the BLM field office in Bakersfield, CA. Information concerning the planning process, including any public participation opportunities, will be announced by BLM through news releases, direct mailings or other applicable means of public notification. Current information about the NPR–2 planning process is also maintained at the Bakersfield Field Office, 3801 Pegasus Dr., Bakersfield, CA 93308, telephone (661) 391–6000.

ADDRESSES: Scoping comments should be sent to Jeff Prude, NPR–2 Amendment Project Manager, Bureau of Land Management, Bakersfield Field Office, 3801 Pegasus Dr., Bakersfield, California, 93308; Fax (661) 391–6156, or e-mail at *jprude@ca.blm.gov.* BLM will maintain a record of public documents related to the development of the RMP amendment at the Bakersfield Field Office at the address listed above. Comments, including names and street addresses of respondents, will be available for public review at the Bakersfield Field Office during regular business hours, 7:30 a.m. to 4:15 p.m., Monday through Friday, excluding federal holidays, and may be published as part of the environmental assessment. Individual respondents may request confidentiality. Individuals who wish to withhold their name or street address from public review or from disclosure under the Freedom of Information Act must state this prominently at the beginning of their written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: For further information or to have your name added to our mailing list, contact Jeff Prude, telephone (661) 391–6140 or e-mail to *jprude@ca.blm.gov.*

SUPPLEMENTARY INFORMATION: The subject federal lands at NPR–2 were transferred from jurisdiction of the Department of Energy to the Bureau of Land Management as a result of the Energy Policy Act of 2005, effective August 8, 2005. A plan amendment is needed because the existing 1997 Caliente RMP does not specifically address management of NPR–2 (since it was not managed by the BLM at the time of the RMP approval). The lands have all been explored or developed for oil and gas operations. All management prescriptions, including oilfield and realty related actions covered in the amendment, will remain consistent with the law, best environmental practice, and balanced use of resources.

The land that was transferred to the BLM contains habitat suitable for several rare plants and animals. The amendment will fulfill the needs and obligations set forth in Section 102(2)(C) of the National Environmental Policy Act (NEPA), Section 202 of the Federal Land Policy and Management Act (FLPMA), and BLM planning regulations contained in 43 CFR part 1600. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns. Preliminary issues and management concerns have been identified by BLM personnel, other agencies, and in meetings with individuals and user groups, including: Making the unleased lands available for competitive oil and gas leasing; providing consistent management for ongoing oil and gas operations on existing leases; land tenure adjustments; management and protection of sensitive, rare, threatened or endangered species; fire management; management integration with other agencies; management consistent with community needs; and access and transportation on the public lands. Disciplines involved in the planning process will include specialists with expertise in wildlife management, minerals and geology, water resources, archaeology, lands and realty, recreation, rangeland management, botany, soils, information technology, sociology, and economics. Likely alternatives to be evaluated may include: (1) ''No Action'' Alternative—no new land use plan allocations related to oil and gas or realty actions; (2) ''Lease with Special Stipulations Consistent with existing Caliente RMP'' Alternative, which will ''prevent unnecessary degradation and * * * provide for ultimate economic recovery of the (hydrocarbon) resources,'' ensure consistency with similar adjacent parcels, and maximize the enhancement and protection of the Area's biological, natural, cultural, and scenic values; and (3) ''Resource Use'' Alternative—Emphasize oil and gas production through use of Standard Lease Terms and Conditions.

Dated: August 17, 2005.

Ron Huntsinger,

Bakersfield BLM Field Manager.

[FR Doc. 05–19131 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–936–1430–ET; HAG–05–0143; OR–59658]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Secretary of the Interior proposes to withdraw on behalf of the Bureau of Land Management, approximately 501.80 acres of public lands, for a period of 20 years, to protect the unique natural, scenic, and recreation values, along the Quartzville Creek Wild and Scenic River corridor in eastern Linn County, Oregon. This notice segregates the lands for up to 2 years from location and entry under the United States mining laws. The lands will remain open to the public land and mineral leasing laws.

DATES: Comments and requests for a public meeting must be received by December 27, 2005.

ADDRESSES: Comments and meeting requests should be sent to the Oregon/Washington State Director, BLM, P.O. Box 2965, Portland, Oregon 97208–2965.

FOR FURTHER INFORMATION CONTACT: Stuart Hirsh, BLM Salem District Office, (503) 375–5623, or Lakisha Sloan, BLM Oregon/Washington State Office, (503) 808–6595.

SUPPLEMENTARY INFORMATION: The applicant is the Bureau of Land Management at the address stated above. The petition/application requests the Secretary of the Interior to withdraw, for 20 years, the following described public lands from location and entry under the United States mining laws, subject to valid existing rights:

Willamette Meridian

T. 11 S., R. 3 E.,
- Sec. 25, W½NE¼NW¼, S½NW¼NW¼, W½NW¼SW¼NW¼, NW¼SW¼NW¼, E½SW¼SW¼NW¼, SE¼SW¼NW¼, NE¼NW¼SW¼, E½NW¼NW¼SW¼, SW¼NW¼SW¼, N½SE¼NW¼SW¼, and W½W½SW¼SW¼;
- Sec. 26, E½SE¼NE¼SE¼, E½NE¼SE¼SE¼, and SE¼SE¼SE¼;
- Sec. 35, W½ lot 3, portion of W½E½ lot 3, NE¼NE¼NE¼, E½W½NE¼NE¼, W½SE¼NE¼NE¼, S½NE¼SW¼NE¼, SE¼SW¼NE¼, W½NE¼SE¼NE¼, NW¼SE¼NE¼, W½SW¼SE¼NE¼, SW¼NE¼SW¼, N½SE¼NE¼SW¼, SW¼SE¼NE¼SW¼, N½NW¼SE¼, and N½S½NW¼SE¼.

T. 12 S., R. 3 E.,
- Sec. 2, portion of W½ lot 3, portion of lot 4, W½SW¼NW¼, and W½NW¼NW¼SW¼;
- Sec. 3, SE¼ lot 1, N½NE¼SE¼NE¼, S½SE¼SE¼NE¼, NE¼SW¼SE¼,E½W½SW¼SE¼, and W½SE¼SW¼SE¼;
- Sec. 9, E½NE¼NE¼SE¼, S½SW¼NE¼SW¼, SE¼NE¼SE¼, E½SE¼NW¼SE¼, E½NE¼SW¼SE¼, and SE¼SW¼SE¼;
- Sec. 10, W½NE¼NW¼NE¼, NW¼NW¼NE¼, N½N½SW¼NW¼NE¼, S½N½NE¼NW¼, SW¼NE¼NW¼, N½N½SE¼NE¼NW¼, E½NE¼SW¼NW¼, S½SW¼SW¼NW¼, SE¼SW¼NW¼, NW¼SE¼NW¼W½SW¼SE¼NW¼, and N½N½NW¼SW¼.

The areas described aggregate 501.80 acres in Linn County.

The BLM petition/application has been approved by the Assistant Secretary, Land and Minerals Management. Therefore, it constitutes a withdrawal proposal of the Secretary of the Interior (43 CFR 2310.1–3(e)).

The use of right-of-way, interagency agreement, or cooperative agreement would not adequately constrain nondiscretionary uses which could irrevocably damage the area, threaten public health and safety, and eliminate the access of the public to mine recreationally.

There are not suitable alternative sites that can be considered because the lands described are entirely within the Quartzville Creek.

No water rights will be needed to fulfill the purpose of this withdrawal.

A preliminary mineral potential evaluation found the above described lands to have high potential for locatable placer gold deposits that would be uneconomical to develop. The management of the river corridor would allow for recreational mining.

The purpose of the proposed withdrawal would be to protect the unique natural, scenic, and recreational values along the Quartzville Creek Wild and Scenic River Corridor.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing, by the date specified above, to the BLM Oregon/Washington State Director at the address indicated above.

Comments, including names and street addresses of respondents, will be available for public view at the BLM Public Room Oregon/Washington State Office, 333 SW. 1st Ave, Portland, Oregon during regular business hours 8:30 a.m. to 4 p.m., Monday through Friday, except holidays. Individual respondents may request confidentiality. If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested parties who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the BLM Oregon/Washington State Director at the address indicated above within 90 days from the publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

The withdrawal proposal will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the **Federal Register**, the lands will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary land uses which may be permitted during this segregative period include licenses, permits, rights-of-way, and disposal of vegetative resources other than under the mining laws.

(Authority: 43 CFR 2310.3–1(a))

Dated: September 19, 2005.

Robert D. DeViney, Jr.,

Chief, Branch of Land and Mineral Resources.

[FR Doc. 05–19132 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice of the Effect of Hurricane Katrina on the Minerals Management Service Internet Public Commenting System, Alternate Methods of Providing Comments

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of alternate methods of commenting in the aftermath of Hurricane Katrina.

SUMMARY: This notice informs the public that Hurricane Katrina disrupted the Minerals Management Service's Internet-based public commenting system, which is hosted on computers in New Orleans, Louisiana. It advises the public of alternate methods they may use to comment on documents.

FOR FURTHER INFORMATION CONTACT: Bill Hauser (703–787–1613) or Kumkum Ray (703–787–1604).

SUPPLEMENTARY INFORMATION:

Background

Hurricane Katrina caused extensive and severe damage in the area of New Orleans, Louisiana. In the aftermath of the hurricane, damage to levees in New Orleans, Louisiana allowed water to flood the city and cause further damage.

Public Connect, the Internet-based public commenting system for the Minerals Management Service, is hosted on computers in the agency's offices located in New Orleans, Louisiana. The storm and aftermath disrupted this system. MMS employees are assessing the damage, but it is not known yet how long it will take to restore this system.

MMS currently has an open comment period for the following document published in the **Federal Register.**

On August 24, 2005, we published in the **Federal Register** a Request for Comments on the Preparation of a New 5-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program for 2007–2012; and on the Intent to Prepare an Environmental Impact Statement (EIS) for the Proposed 5-Year Program (70 FR 49669). This notice provided that the public could submit comments by mail or through the Internet. Because Public Connect is not available in the aftermath of Hurricane Katrina, all comments must be mailed to: Renee Orr, 5-Year Program Manager, Minerals Management Service (MS–4010), Room 3120, 381 Elden Street, Herndon, Virginia 20170.

MMS was able to receive comments that were submitted to Public Connect before Hurricane Katrina hit New Orleans, Louisiana on Monday, August 29. If you submitted a comment through Public Connect on or after Friday, August 26, you should re-submit the comment by mail to the address above to assure that we receive the comment.

Dated: September 14, 2005.

R.M. ''Johnnie'' Burton,

Director, Minerals Management Service.

[FR Doc. 05–19091 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–MR–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–05–030]

Government in the Sunshine Act Meeting Notice

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: October 3, 2005 at 2 p.m.

PLACE: Room 101, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda for future meetings: None.
2. Minutes.
3. Ratification List.
4. Inv. No. TA–421–6 (Market Disruption) (Circular Welded Non-Alloy Steel Pipe from China)—briefing and vote. (The Commission is scheduled to transmit its determination on market disruption to the President and the United States Trade Representative on October 3, 2005.)
5. Outstanding action jackets: None

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: September 22, 2005.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 05–19247 Filed 9–22–05; 11:10 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act and Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on Sept4ember 20, 2005, a proposed Consent Decree in two consolidated cases—*United States* v. *Motiva Enterprises LLC*, Civil action No. 02–1292–SLR, and *The Department of Natural Resources and Environmental Control, an agency of the State of Delaware* v. *Motiva Enterprises LLC*, Civil Action No. 02–1293–SLR—was lodged with the United States District Court for the District of Delaware.

The United States' and the Department of Natural Resources and Environmental Control's (''DNREC's'') actions sought injunctive relief and civil penalties to address violations of the Clean Water Act, the Clean Air Act, and several state statutes that occurred in connection with a July 17, 2001 explosion at the Delaware City Refinery, then owned and operated by Motiva Enterprises LLC (''Motiva''). Under the Consent Decree, Motiva will pay a $12 million civil penalty: $6.25 million will be paid to the U.S. and $5.75 million to DNREC.

Motiva will also carry out six environmental projects at a cost of approximately $3.96 million. First Motiva will spend approximately $2.0 million to purchase three hybrid diesel-electric buses for the Delaware Transit Corporation and provide maintenance funds for the buses. Second, the Company that purchased the refinery from Motiva in 2004, The Premcor Refining Group Inc. (''Premcor''), will grant a conservation easement over 285 acres of refinery land that will protect the area in perpetuity. Motiva will then spend at least $447,500 planting trees and controlling invasive species and taking other steps to return the area to its natural state. Third, Motiva will spend approximately $550,000 to reintroduce native species of shellfish into parts of the Delaware River they formerly inhabited. Fourth, Motiva will purchase $165,000-worth of emergency equipment for the local fire department. Fifth, Motiva will pay approximately $550,000 to construct a weather-monitoring station near the refinery for DNREC and pay a portion of the station's operating coasts. Sixth and finally, Motiva will spend $250,000 to install and operate for approximately five years a river-monitoring station near Pea Patch Island.

In addition. Premcor, now a subsidiary of Valero Energy Corporation, will implement a number of accident-prevention measures. For example, at the refinery's alkylation unit, Premcor will take steps to ensure that equipment that reduces the quantity of explosive hydrocarbons in spent sulfuric acid is operating whenever the alkylation unit is operating. Procedures for issuing hot work permits and for responding to holes and leaks in tanks will be tightened. The refinery will manage spent sulfuric acid as if spent sulfuric acid were a regulated substance under

EPA's accident prevention regulations, 40 CFR part 68.

The United Stated Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Motiva Enterprises LLC*, D.J. Ref. No. 90–5–1–1–07551.

The Consent Decree may be examined during the public comment period on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/open.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, PO box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonio Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. If requesting from the Consent Decree Library a full copy of the Consent Decree including its attachments, please enclose a check in the amount of $37.50 (25 cents per page reproduction cost) payable to the U.S. Treasury. If requesting a copy of the Consent Decree without its attachments, please enclose a check in the amount of $18.75 payable to the U.S. Treasury.

Bob Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 05–19088 Filed 9–23–05; 8:45am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

[Docket No. OJP (OJP) 1421]

Meeting of the Public Safety Officer Medal of Valor Review Board

AGENCY: Office of Justice Programs (OJP), Justice.

ACTION: Notice of meeting.

SUMMARY: The Department of Justice, Office of Justice Programs, is announcing a meeting of the Public Safety Officer Medal of Valor Review Board.

DATES: Thursday, October 13, 2005, 9 a.m. to 5 p.m., and Friday, October 14, 2005, 9 a.m. to 5 p.m.

ADDRESSES: The meeting will take place at the Sheraton Burlington Hotel and Conference Center, 870 Williston Road, Burlington, Vermont, 05403, telephone: 802–865–6600.

FOR FURTHER INFORMATION CONTACT: Michelle Shaw, Policy Advisor, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street, NW., Washington, DC 20531, by telephone at (202) 514–9354, or by e-mail at *michelle.a.shaw@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The President of the United States awards the Public Safety Officer Medal of Valor for valor by a Public Safety Officer. The Public Safety Officer Medal of Valor Review Board is authorized to carry out its advisory function under 42 U.S.C. 15202. The purpose of this meeting is to review applications for the 2005 Medal of Valor Awards and to discuss upcoming activities related thereto.

This meeting will be open to the public and registrations will be accepted on a *space available* basis. Members of the public who wish to attend the meeting must register at least five (5) days in advance of the meeting by contacting Ms. Shaw. *Prior registration will be required in order to attending the meeting.* All attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the meeting. Anyone requiring special accommodations should contact Ms. Shaw at least five (5) days in advance of the meeting.

Dated: September 20, 2005.

Domingo S. Herraiz,

Director, Bureau of Justice Assistance.

[FR Doc. 05–19095 Filed 9–23–05; 8:45 am]

BILLING CODE 4410–18–P

MERIT SYSTEMS PROTECTION BOARD

Membership of the Merit Systems Protection Board's Senior Executive Service Performance Review Board

AGENCY: Merit Systems Protection Board.

ACTION: Notice.

SUMMARY: Notice is hereby given of the members of the Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Janice Bradley, HR Director, Finance and Administrative Management, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419.

SUPPLEMENTARY INFORMATION: The Merit Systems Protection Board is publishing the names of the new and current members of the Performance Review Board (PRB) as required by 5 U.S.C. 4314(c)(4). Deborah Miron, William Boulden and Martha Schneider will serve as members. Martha Schneider will serve as Chair of the PRB. Gail T. Lovelace will serve as a new member.

Bentley M. Roberts, Jr.,

Clerk of the Board.

[FR Doc. 05–19104 Filed 9–23–05; 8:45 am]

BILLING CODE 7400–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 05–144]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Mr. Walter Kit, Office of the Chief Information Officer, Mail Suite 6M70, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Mr. Walter Kit, Office of the Chief Information Officer, NASA Headquarters, 300 E Street SW., Mail Suite 6M70, Washington, DC 20546, (202) 358–1350, *walter.kit-1@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The NASA Contractor Financial Management Reporting System is the basic financial medium for contractor reporting of estimated and incurred costs, providing essential data for projecting costs and hours to ensure that contractor performance is realistically planned and supported by dollar and labor resources. The data provided by these reports is an integral part of the Agency's accrual accounting and cost-based budgeting systems required under 31 U.S.C. 3512.

II. Method of Collection

NASA collects this information electronically where feasible, but information may also be collected by mail or fax.

III. Data

Title: NASA Contractor Financial Management Reports.

OMB Number: 2700–0003.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit, not-for-profit institutions.

Estimated Number of Respondents: 850.

Estimated Time Per Response: 9 hrs.

Estimated Total Annual Burden Hours: 91,500.

Estimated Total Annual Cost: $0.

IV. Requests for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Dated: September 15, 2005.

Patricia L. Dunnington,

Chief Information Officer.

[FR Doc. 05–19167 Filed 9–23–05; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Computer and Information Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Computer and Information Science and Engineering—(1115).

Date and Time: October 20, 2005, 8:30 a.m.–7 p.m. October 21, 2005, 8:30 a.m.–2 p.m.

Place: Computer History Museum, 1401 N. Shoreline Blvd., Mountain View, CA 94043.

Type of Meeting: Open.

Contact Person: Gwen Barber-Blount, Office of the Assistant Director, Directorate for Computer and Information Science and Engineering, National Science Foundation, 4201 Wilson Blvd., Suite 1105, Arlington, VA 22230. Telephone: (703) 292–8900.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs and activities on the CISE community. To provide advice to the Assistant Director/CISE on issues related to long-range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

Agenda: Report from the Assistant Director. Discussion of education, diversity, workforce issues in IT; cyberinfrastructure; long-range founding outlook and proposal success rates.

Dated: September 20, 2005.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 05–19080 Filed 9–23–05; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel in Earth Sciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Earth Sciences Proposal Review Panel (1569).

Date & Time: October 20–21, 2005, 8 a.m.–6 p.m.

Place: UNAVCO Inc., 6350 Nautilus Drive, Boulder, CO 80301.

Type of Meeting: Part-Open—(see Agenda below).

Contact Person: Mr. Russell Kelz, Program Director, Instrumentation & Facilities Program, Division of Earth Sciences, National Sciences Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. Telephone: (703) 292–8558.

Purpose of Meeting: To carry out review of UNAVCO management and leadership as stipulated in cooperative agreement EAR–0321760.

Agenda

Closed: October 20 from 8:30–9:30 a.m.: organization meeting, introductions, review of charge to review panel, discussion of COI; and from 1–5 p.m.: panel discussion, write up of summary of findings and recommendations. October 21 from 8:30 a.m.–2 p.m.: complete panel summary and recommendations.

Open: October 20 from 9:30 a.m.–12 p.m.: Presentation by UNAVCO, Inc management and Q&A between panel and UNAVCO, Inc.; October 21 from 3–4 p.m.: Presentation of panel draft findings to NSF/EAR/IF Program.

Reason for Closing: During the closed sessions, the panel will be reviewing information of a proprietary or confidential nature, including technical information, financial data such as salaries, and personal information that could harm individuals if they are disclosed. If discussions were open to the public, these matters that are exempt under 5 U.S.C. 552b(c)(4) and (6) of the Government in the Sunshine Act would be improperly disclosed.

Dated: September 20, 2005.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 05–19081 Filed 9–23–05; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Proposal Review Panel for Materials Research (DMR) #1203.

Dates & Times: October 6, 2005; 7:45 a.m.–6:30 p.m. (open 7:45–12:45, 1:45–5). October 7, 2005; 8 a.m.–3:30 p.m. (closed).

Place: California State University at Los Angeles, Los Angeles, CA.

Type of Meeting: Part open.

Contact Person: Dr. Thomas P. Rieker, Program Director, Materials Research Science and Engineering Centers, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–4914.

Purpose of Meeting: To provide advice and recommendations concerning progress of the Partnership for Research and Education in Materials.

Agenda: October 6, 2005—Open for Directors overview of the Partnership for Research and Education in Materials. October 6 & 7, 2005—Closed to review and evaluate progress of the Partnership for Research and Education in Materials.

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 20, 2005.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 05–19082 Filed 9–23–05; 8:45am]

BILLING CODE 7555–07–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–445]

TXU Generation Company LP; Comanche Peak Steam Electric Station, Unit 1; Notice of Consideration of Issuance of Amendment to Facility Operating License No. NPF–87 Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendment to Facility Operating License No. NPF–87, issued to TXU Generation Company LP (the licensee), for operation of the Comanche Peak Steam Electric Station (CPSES), Unit 1, located in Somervell County, Texas.

The proposed amendment would revise Technical Specification (TS) 5.6.5, ''Core Operating Limits Report (COLR),'' by adding topical report WCAP–13060–P–A, ''Westinghouse Fuel Assembly Reconstitution Evaluation Methodology,'' to the list of NRC approved methodologies to be used at CPSES, Unit 1.

By application dated April 27, 2005, as supplemented by letter dated July 20, 2005, the licensee requested the approval of the proposed amendment by October 8, 2005. The approval of the proposed amendment is needed to permit the licensee to use the reconstitution method of fuel assembly repair at CPSES Unit 1. The NRC staff inadvertently did not publish a **Federal Register** notice of Consideration of Issuance of Amendments to Facility Operating Licenses, and Proposed No Significant Hazards Consideration Determination, in time to permit a 30 days period for prior public comment as required by Section 50.91 of Title 10 of the Code of Federal Regulations (10 CFR). The Commission finds that exigent circumstances exist, in that the licensee and the Commission must act quickly and that time does not permit the Commission to publish a **Federal Register** notice allowing 30 days for prior public comment, and it also determines that the amendment involves no significant hazards.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

Pursuant to 10 CFR 50.91(a)(6) for amendments to be granted under exigent circumstances, the NRC staff must determine that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change is administrative in nature and as such does not impact the condition or performance of any plant structure, system or component. The core operating limits are established to support Technical Specifications 3.1, 3.2, 3.3, 3.4, and 3.9. The core operating limits ensure that fuel design limits are not exceeded during any conditions of normal operation or in the event of any Anticipated Operational Occurrence (AOO). The methods used to determine the core operating limits for each operating cycle are based on methods previously found acceptable by the NRC and listed in TS section 5.6.5.b. Application of these approved methods will continue to ensure that acceptable operating limits are established to protect the fuel cladding integrity during normal operation and AOOs. The requested Technical Specification change does not involve any plant modifications or operational changes that could affect system reliability, performance, or possibility of operator error. The requested change does not affect any postulated accident precursors, does not affect any accident mitigation systems, and does not introduce any new accident initiation mechanisms.

As a result, the proposed change to the CPSES Technical Specifications does not involve any increase in the probability or the consequences of any accident or malfunction of equipment important to safety previously evaluated since neither accident probabilities nor consequences are being affected by this proposed administrative change.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change is administrative in nature, and therefore does not involve any change in station operation or physical modifications to the plant. In addition, no changes are being made in the methods used to respond to plant transients that have been previously analyzed. No changes are being made to plant parameters within which the plant is normally operated or in the setpoints, which initiate protective or mitigative actions, and no new failure modes are being introduced.

Therefore, the proposed administrative change to the CPSES Technical Specifications does not create the possibility of a new or different kind of accident or malfunction of equipment important to safety from any accident previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed change is administrative in nature and does not impact station operation or any plant structure, system or component that is relied upon for accident mitigation. Furthermore, the margin of safety assumed in the plant safety analysis is not affected in any way by the proposed administrative change.

Therefore, the proposed change to the CPSES Technical Specifications does not involve any reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 14 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 14-day notice period. However, should circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 14-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should

the Commission take this action, it will publish in the **Federal Register** a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m., Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner/requestor is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petitioner/requestor must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV*; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301–415–3725 or by e-mail to *OGCMailCenter@nrc.gov*. A copy of the request for hearing and petition for leave to intervene should also be sent to George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036, attorney for the licensee.

For further details with respect to this action, see the application for amendments dated April 27, 2005, and supplement dated July 20, 2005, which are available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site *http://www.nrc.gov/*

reading-rm.html. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 21st day of September 2005.

For the Nuclear Regulatory Commission.

Mohan C. Thadani,

Senior Project Manager, Section 1, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 05–19236 Filed 9–23–05; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52469; File No. SR–Amex–2005–089]

Self-Regulatory Organizations; American Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Options Licensing Fees for Certain Vanguard ETF Options

September 19, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 9, 2005, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by Amex. Amex submitted the proposed rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify its options fee schedule by adopting a per-contract side licensing fee for the orders of specialists, registered options traders (''ROTs''), firms, non-member market makers, and broker-dealers in connection with transactions in options on certain Vanguard exchange-traded funds (''ETFs'').

The text of the proposed rule change is available on Amex's Web site *http://www.amex.com*, at Amex's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has entered into numerous license agreements with issuers and owners of indexes for the purpose of trading options on certain ETFs. The requirement to pay an index licensing fee to third parties is a condition to the listing and trading of these ETF options. In many cases, the Exchange is required to pay a significant licensing fee to issuers or index owners that may not be reimbursed. In an effort to recoup the costs associated with certain index licenses, the Exchange has established a per-contract side licensing fee for the orders of specialists, ROTs, firms, non-member market makers, and broker-dealers collected on every transaction in certain designated products in which such market participant is a party.[5]

The purpose of the proposal is to charge a per-contract side licensing fee in connection with transactions in certain options on the Vanguard ETFs (''Vanguard ETF Options''). Specifically, Amex seeks to charge an options licensing fee of $0.10 per contract side for specialist, ROT, firm, non-member market maker, and broker-dealer orders executed on the Exchange in connection with the following Vanguard ETFs:

(1) Vanguard Consumer Discretionary VIPERs (symbol: VCR);

(2) Vanguard Consumer Staples VIPERs (symbol: VDC);

(3) Vanguard Energy VIPERs (symbol: VDE);

(4) Vanguard Financials VIPERs (symbol: VFH);

(5) Vanguard Health Care VIPERs (symbol: VHT);

(6) Vanguard Industrials VIPERs (symbol: VIS);

(7) Vanguard Information Technology VIPERs (symbol: VGT);

(8) Vanguard Materials VIPERs (symbol: VAW);

(9) Vanguard Utilities VIPERs (symbol: VPU);

(10) Vanguard Telecommunication Services VIPERs (symbol: VOX);

(11) Vanguard REIT VIPERs (symbol: VNQ);

(12) Vanguard Small-Cap Growth VIPERs (symbol: VBK);

(13) Vanguard Small-Cap Value VIPERs (symbol: VBR);

(14) Vanguard Mid-Cap VIPERs (symbol: VO);

(15) Vanguard Large-Cap VIPERs (symbol: VV);

(16) Vanguard Growth VIPERs (symbol: VUG);

(17) Vanguard Value VIPERs (symbol: VTV); and

(18) Vanguard Small-Cap VIPERs (symbol: VB).

In addition, the Exchange also proposes to charge an options licensing fee of $0.09 per contract side for specialist, ROT, firm, non-member market maker, and broker-dealer orders executed on the Exchange in connection with the Vanguard Extended Market VIPERs (symbol: VXF). The proposal also revises Section V (Options Licensing Fee) of the Options Fee Schedule to designate the SPDR O-Strip by its symbol ''OOO.'' In all cases, the fees set forth in the Options Fee Schedule are charged only to Exchange members through whom the orders are placed.

The proposed options licensing fees will allow the Exchange to recoup its costs in connection with index licensing fees for the trading of the Vanguard ETF Options. The fees will be collected on every Vanguard ETF Option order of a specialist, ROT, firm, non-member market maker, and broker-dealer executed on the Exchange. The Exchange believes that collection of a per-contract side licensing fee in connection with Vanguard ETF Options orders placed by those market participants that are the beneficiaries of the Exchange's index license agreements is justified and consistent with the rules of the Exchange.

The Exchange notes that Amex in recent years has revised a number of fees to better align Exchange fees with the actual cost of delivering services and to reduce Exchange subsidies of such

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* File No. SR–Amex–2005–087 (filed on August 31, 2004, and pending before the Commission).

services.[6] Implementation of this proposal is consistent with the reduction and/or elimination of these subsidies. Amex believes that these fees will help to allocate to those market participants offering Vanguard ETF Options a fair share of the related costs of offering such options. In connection with the adoption of an options licensing fee for the Vanguard ETF Options, the Exchange notes that the proposal will better align its licensing fees with its competitors. The Exchange also maintains that charging an options licensing fee, where applicable, for all market participant orders executed on the Exchange except for customer orders is reasonable given the competitive pressures in the industry. Accordingly, the Exchange seeks, through this proposal, to better align its charges with the cost of providing these products and maintaining the trading floor and systems.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(4) of the Act,[8] in particular, regarding the equitable allocation of reasonable dues, fees, and other charges among exchange members and other persons using exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4 thereunder,[10] because it establishes or changes a due, fee, or other charge imposed by Amex. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2005–089 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2005–089. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal offices of Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2005–089 and should be submitted on or before October 17, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–5169 Filed 9–23–05; 8:45 am]

BILLING CODE 8010–01–P

[6] *See* Securities Exchange Act Release Nos. 45360 (January 29, 2002), 67 FR 5626 (February 6, 2002) and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(a)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52470; File No. SR–Amex–2005–090]

Self-Regulatory Organizations; American Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Options Licensing Fees for Spade Defense Index Option

September 19, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 9, 2005, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by Amex. Amex submitted the proposed rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify its options fee schedule by adopting a per-contract side licensing fee for the orders of specialists, registered options traders (''ROTs''), firms, non-member market makers, and broker-dealers in connection with transactions in Spade Defense Index options (symbol: DXS).

The text of the proposed rule change is available on Amex's Web site *http://www.amex.com*, at Amex's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has entered into numerous license agreements with issuers and owners of indexes for the purpose of trading options on certain exchange-traded funds (''ETFs'') and securities indexes. The requirement to pay an index licensing fee to third parties is a condition to the listing and trading of these ETF and index options. In many cases, the Exchange is required to pay a significant licensing fee to issuers or index owners that may not be reimbursed. In an effort to recoup the costs associated with certain index licenses, the Exchange has established a per-contract side licensing fee for the orders of specialists, ROTs, firms, non-member market makers, and broker-dealers collected on every transaction in certain designated products in which such market participant is a party.[5]

The purpose of the proposal is to charge a per-contract side licensing fee in connection with transactions in the Spade Defense Index options. Specifically, Amex seeks to charge an options licensing fee of $0.09 per contract side for specialist, ROT, firm, non-member market maker, and broker-dealer orders executed on the Exchange in connection with the Spade Defense Index options. In all cases, the fees set forth in the Options Fee Schedule are charged only to Exchange members through whom the orders are placed.

The proposed options licensing fee will allow the Exchange to recoup its costs in connection with index licensing fees for the trading of the Spade Defense Index options. The fee will be collected on every Spade Defense Index option order of a specialist, ROT, firm, non-member market maker, and broker-dealer executed on the Exchange. The Exchange believes that collection of a per-contract side licensing fee in connection with Spade Defense Index options orders placed by those market participants that are the beneficiaries of the Exchange's index license agreements is justified and consistent with the rules of the Exchange.

The Exchange notes that Amex in recent years has revised a number of fees to better align Exchange fees with the actual cost of delivering services and to reduce Exchange subsidies of such services.[6] Implementation of this proposal is consistent with the reduction and/or elimination of these subsidies. Amex believes that this fee will help to allocate to those market participants offering Spade Defense Index options a fair share of the related costs of offering such options. In connection with the adoption of an options licensing fee for the Spade Defense Index options, the Exchange notes that the proposal will better align its licensing fees with its competitors. The Exchange also maintains that charging an options licensing fee, where applicable, for all market participant orders executed on the Exchange except for customer orders is reasonable given the competitive pressures in the industry. Accordingly, the Exchange seeks, through this proposal, to better align its charges with the cost of providing these products and maintaining the trading floor and systems.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(4) of the Act,[8] in particular, regarding the equitable allocation of reasonable dues, fees, and other charges among exchange members and other persons using exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4 thereunder,[10] because it establishes or changes a due, fee, or other charge imposed by Amex. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Amex–2005–090 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2005–090. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[5] *See* File No. SR–Amex–2005–087 (filed on August 31, 2004, and pending before the Commission).

[6] *See* Securities Exchange Act Release Nos. 45360 (January 29, 2002), 67 FR 5626 (February 6, 2002) and 44286 (May 9, 2001), 66 FR 27187 (May 16, 2001).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(a)(ii).

[10] 17 CFR 240.19b–4(f)(2).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal offices of Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2005–090 and should be submitted on or before October 17, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–5170 Filed 9–23–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52471; File No. SR–DTC–2005–08]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change Relating to the New Canadian-Link Service

September 19, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on July 27, 2005, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') and on August 30, 2005, amended the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would enable participants of DTC and participants of The Canadian Depository for Securities Limited (''CDS'') (i) to clear and settle securities transactions in Canadian dollars and (ii) to transfer or receive Canadian dollars without any corresponding delivery or receipt of securities.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Overview of the Canadian Link Service

The purpose of the proposed rule change is to create a new DTC service, the Canadian-Link Service, that will facilitate the clearance and settlement of valued securities transactions and the transfer of funds denominated in Canadian dollars between DTC's Participants using the Canadian-Link Service (''Canadian-Link Participants'') and CDS Participants and between Canadian-Link Participants and other Canadian-Link Participants. Currently, DTC processes transactions in U.S. dollars only. The Canadian-Link Service will:

(1) Create a new link between DTC and CDS to leverage the existing CDS infrastructure for clearing and settling valued securities transactions and transferring funds in Canadian dollars so that DTC will not have to replicate this infrastructure;

(2) Apply enhanced DTC risk management controls to the transactions processed for Canadian-Link Participants through the Canadian-Link Service and will also subject DTC to CDS risk management controls, which are similar in most respects to DTC risk management controls; and

(3) Permit DTC Participants to concentrate their securities positions at DTC and not bifurcate inventory between DTC and CDS or a Canadian custodian.

At the present time, CDS maintains a number of links with DTC and the National Securities Clearing Corporation (''NSCC''). These links include:

(1) The American and Canadian Connection for Efficient Securities Settlement (''ACCESS'') Service enables CDS Participants to clear and settle transactions with DTC Participants through omnibus accounts maintained by CDS with DTC and NSCC.[3] CDS Participants that use the ACCESS Service are not participants or members of DTC or NSCC nor does CDS maintain or sponsor individual accounts at DTC or NSCC for such CDS Participants.

(2) The New York Link Service enables CDS Participants to clear and settle transactions with DTC Participants through sponsored accounts maintained by CDS with DTC and NSCC. Through such sponsored accounts, CDS Participants may clear and settle transactions on a trade for trade basis or on a continuous net settlement basis through the facilities of DTC and NSCC.

(3) The DTC Direct Link Service enables CDS Participants to clear and settle transactions with DTC Participants through sponsored accounts maintained by CDS with DTC. Through such sponsored accounts, CDS Participants may clear and settle their transactions on a trade for trade basis through the facilities of DTC.

At the present time, DTC maintains no comparable links with CDS, although DTC Participants may use the ACCESS Service of CDS for free deliveries of securities to and from CDS Participants. With the implementation of the Canadian-Link Service by DTC, Canadian-Link Participants will have the same ability to clear and settle valued securities transactions with CDS Participants and other Canadian-Link Participants in Canadian dollars that CDS Participants now have to clear and settle valued securities transactions with DTC Participants in U.S. dollars. As noted above, this will be accomplished using the existing CDS infrastructure for processing transactions in Canadian dollars together with enhanced DTC risk management controls.

2. The DTC Omnibus Account

CDS will maintain for DTC, as a participant of CDS, a ledger consisting of a series of accounts, including a securities account to record securities held by CDS for DTC and securities to be delivered by DTC to CDS and a funds account to record the net amount of money owing from time to time intraday

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

[3] CDS has advised DTC that it has decided to terminate the ACCESS Service and transfer its users to the New York Link Service. However, the ACCESS Service will continue to be available to DTC Participants for free deliveries of securities to and from CDS Participants.

between DTC and CDS. Such ledger and the accounts included in the ledger are referred to collectively as the ''DTC Omnibus Account.''

The DTC Omnibus Account will be subject to all CDS risk management controls, including the full collateralization of securities transactions subject to appropriate haircuts and limits on allowable net debits. DTC will be the account party on the DTC Omnibus Account. As a participant of CDS, DTC will be liable to CDS with respect to transactions processed for Canadian-Link Participants through the DTC Omnibus Account. Such obligations of DTC to CDS will, in turn, be matched by the obligations of Canadian-Link Participants to DTC with respect to such transactions. As an operational matter, DTC will act as a conduit between Canadian-Link Participants and CDS by transmitting to CDS information and instructions received from Canadian-Link Participants and by transmitting to Canadian-Link Participants information and instructions received from CDS. CDS and Canadian-Link Participants will not have a direct relationship with each other.

The DTC Omnibus Account will have its own (i) collateral requirements and controls and net debit requirements and controls, (ii) settlement obligations, and (iii) line of credit from a Canadian bank that is a CDS Participant to secure the settlement obligations of DTC to CDS. In accordance with the Rules and Procedures of CDS, DTC will be a member of a credit ring with certain other CDS Participants.[4] Although DTC will take instructions from Canadian-Link Participants with respect to their transactions with CDS Participants through the Canadian-Link Service, DTC will at all times maintain control over the securities and funds credited to the DTC Omnibus Account.

Transactions will be processed in the CDS system on each day that CDS is open for business (''CDS Business Day'') whether or not such day is a day that DTC is otherwise open for business (''DTC Business Day'').

3. Transactions Processed Through the Canadian-Link Service

Transactions between Canadian-Link Participants and CDS Participants will be processed through the DTC Omnibus Account in accordance with the Rules and Procedures of CDS. Canadian-Link Participants will be able (i) to deliver securities to or receive securities from CDS Participants against payment in Canadian dollars and (ii) to transfer funds to or receive funds from CDS Participants in Canadian dollars without any corresponding delivery or receipt of securities.

Transactions between Canadian-Link Participants and other Canadian-Link Participants will be processed through accounts at DTC in accordance with the Rules and Procedures of DTC. Canadian-Link Participants will be able to (i) deliver securities to or receive securities from other Canadian-Link Participants against payment in Canadian dollars and (ii) transfer funds to or receive funds from other Canadian-Link Participants in Canadian dollars without any corresponding delivery or receipt of securities.

For both transactions between Canadian-Link Participants and CDS Participants processed through the DTC Omnibus Account and transactions between Canadian-Link Participants and other Canadian-Link Participants processed through accounts at DTC, there will be a single end-of-day Canadian dollar money settlement between DTC and its Canadian-Link Participants (''Canadian-Link Money Settlement''). For the transactions between Canadian-Link Participants and CDS Participants processed through the DTC Omnibus Account, there will be a separate end-of-day Canadian dollar money settlement between CDS and DTC.

4. Eligibility of Participants and Securities

All DTC Participants will be eligible to be Canadian-Link Participants and use the Canadian-Link Service, provided that they comply with (i) the Rules and Procedures of DTC, (ii) the Rules and Procedures of CDS, and (iii) all agreements between DTC and CDS relating to the participation of DTC in CDS. (Such agreements together with the Rules and Procedures of CDS will be referred to as the ''Canadian-Link Documents'').

DTC will determine what securities will be eligible for the Canadian-Link Service (''Canadian-Link Securities''). Some securities may be eligible for all purposes of the Canadian-Link Service and some securities may be eligible only for limited purposes (*e.g.*, clearance and settlement through the facilities of CDS but only custody and asset servicing through the facilities of DTC). In no case will a security be eligible for the Canadian-Link Service if the issuer is on an OFAC list of specially designated nationals and blocked persons or is incorporated in a jurisdiction on an OFAC list of sanctioned countries. As is the case with securities processed through the facilities of DTC, it will be DTC rather than CDS that will monitor such compliance with OFAC regulations.

5. Enhanced DTC Risk Management Controls

Each Canadian-Link Participant will be required to make an additional required cash deposit to the DTC Participants Fund (''Canadian-Link Required Participants Fund Deposit''). The amount of the Canadian-Link Required Participants Fund Deposit will be determined by a formula that will be fixed by DTC and will be set forth in DTC's procedures. For all purposes of the Rules and Procedures of DTC, the Canadian-Link Required Participants Fund Deposit of a Canadian-Link Participant will be considered a part of the Required Participants Fund Deposit of such Participant and will secure all of the obligations of such Participant to DTC, including transactions processed for such Participant through the Canadian-Link Service and other transactions processed by DTC for such Participant.

Each Canadian-Link Participant will be assigned a net debit cap on the transactions that may be processed for such Participant through the Canadian-Link Service (''Canadian-Link Net Debit Cap''). The Canadian-Link Net Debit Cap of a Canadian-Link Participant will be determined by a formula that will be fixed by DTC and will be set forth in DTC's procedures. Under existing DTC Rules, which will not be affected by new Rule 30, each DTC Participant is assigned a Net Debit Cap on the transactions that may be processed for such Participant through the facilities of DTC (*i.e.*, a limit on the negative funds balance that may from time to time be incurred with respect to its U.S. dollar transactions). The Canadian-Link Net Debit Cap of a Canadian-Link Participant and not its Net Debit Cap will apply to the transactions of such Participant processed through the Canadian-Link Service, including both transactions with CDS Participants processed for such Participant through the DTC Omnibus Account and transactions with other Canadian-Link Participants processed for such Participant through accounts at DTC. The Net Debit Cap of a Canadian-Link Participant and not its Canadian-Link Net Debit Cap will apply to all other transactions processed by DTC for such Participant.

[4] CDS has advised DTC that (i) DTC will be required to be a member of the Non-Contributing Receivers Credit Ring for Canadian Dollar Settlements, (ii) the only claims that could be made against DTC as a member of this credit ring involve very unusual events, and (iii) no claim has ever been made by CDS against any member of this credit ring.

Each Canadian-Link Participant will have a single Collateral Monitor with respect to transactions processed for such Participant through the Canadian-Link Service and other transactions processed by DTC for such Participant. For purposes of the Canadian-Link Service, the Collateral Monitor of a Canadian-Link Participant will be adjusted as follows:

(1) Canadian dollar net credits from transactions processed for such Participant through the Canadian-Link Service will be converted into U.S. dollar equivalents and added to U.S. dollar net credits from other transactions processed by DTC for such Participant;

(2) Canadian dollar net debits from transactions processed for such Participant through the Canadian-Link Service will be converted into U.S. dollar equivalents and added to U.S. dollar net debits from other transactions processed by DTC for such Participant;

(3) The Collateral Value of Canadian-Link Securities delivered by such Participant to CDS Participants through the DTC Omnibus Account and the Collateral Value of Canadian-Link Securities delivered by such Participant to other Canadian-Link Participants through accounts at DTC will be converted into U.S. dollar equivalents and deducted from the Collateral Value of the collateral of such Participant; and

(4) Collateral Value in U.S. dollars will be given for Canadian-Link Securities received by such Participant from other Canadian-Link Participants but no Collateral Value will be given for Canadian-Link Securities received by such Participant from CDS Participants unless and until such securities are credited to an account of such Participant at DTC.

6. Instructions for Transactions Processed Through the Canadian-Link Service

A Canadian-Link Participant may give DTC an instruction to clear and settle a securities transaction or to effect a funds transaction between such Participant and a CDS Participant as follows:

(1) An instruction from a Canadian-Link Participant to DTC to clear and settle a delivery of Canadian-Link Securities to a CDS Participant will constitute an instruction for DTC (i) to report or to confirm as appropriate the details of the transaction to CDS for processing in the CDS system and (ii) to transfer the securities subject to such instruction from an account of such Participant at DTC to the DTC Omnibus Account for the purpose of making such delivery on the settlement date;

(2) An instruction from a Canadian-Link Participant to DTC to clear and settle a receipt of Canadian-Link Securities from a CDS Participant will constitute an instruction for DTC (i) to report or to confirm as appropriate the details of the transaction to CDS for processing in the CDS system and (ii) to transfer subject to CDS risk management controls the Securities subject to such instruction from the DTC Omnibus Account to an account of such Participant at DTC on the settlement date;

(3) An instruction from a Canadian-Link Participant to DTC with respect to a payment of Canadian dollars to a CDS Participant without any corresponding receipt of Canadian-Link Securities will constitute an instruction for DTC to report or confirm as appropriate the details of the transaction to CDS for processing in the CDS system; and

(4) An instruction from a Canadian-Link Participant to DTC with respect to a receipt of Canadian dollars from a CDS Participant without any corresponding delivery of Canadian-Link Securities will constitute an instruction for DTC to report or confirm as appropriate the details of the transaction to CDS for processing in the CDS system.

A Canadian-Link Participant may give DTC an instruction to clear and settle a securities transaction or effect a funds transaction with another Canadian-Link Participant as follows:

(1) An instruction from a Canadian-Link Participant to DTC to clear and settle a delivery of Canadian-Link Securities to another Canadian-Link Participant will constitute an instruction for DTC (i) to match the details of such transaction and (ii) if such details match, to debit the securities from an account of the delivering Participant at DTC and to credit the securities to an account of the receiving Participant at DTC and (iii) credit the delivering Participant and debit the receiving Participant the contract price of the securities in Canadian-Link Money Settlement;

(2) An instruction from a Canadian-Link Participant to DTC to clear and settle a receipt of Canadian-Link Securities from another Canadian-Link Participant will constitute an instruction for DTC (i) to match the details of such transaction and (ii) if such details match, to credit the securities to an account of the receiving Participant at DTC and debit the securities from an account of the delivering Participant at DTC, and (iii) to debit the receiving Participant and credit the delivering Participant the contract price of the securities in Canadian-Link Money Settlement;

(3) An instruction from a Canadian-Link Participant to DTC with respect to the payment of Canadian dollars to another Canadian-Link Participant without any corresponding receipt of Canadian-Link Securities will constitute an instruction for DTC (i) to match the details of such transaction and (ii) if such details match, to debit the paying Participant and credit the receiving Participant the appropriate amount of funds in Canadian-Link Money Settlement;

(4) An instruction from a Canadian-Link Participant to DTC with respect to the receipt of Canadian dollars from another Canadian-Link Participant without any corresponding delivery of Canadian-Link Securities will constitute an instruction for DTC (i) to match the details of such transaction and (ii) if such details match, to credit the paying Participant and debit the receiving Participant the appropriate amount of funds in Canadian-Link Money Settlement.

All valued securities transactions processed through the Canadian-Link Service will be settled trade for trade on a delivery against payment basis.

7. The Settlement of Transactions Processed Through the Canadian-Link Service

On each CDS Business Day, CDS will give DTC a recap of all transactions processed for DTC through the DTC Omnibus Account on such CDS Business Day and the net amount of money that CDS owes DTC or that DTC owes CDS with respect to such transactions. In turn, DTC will give each Canadian-Link Participant a recap of the transactions processed for such Participant through the Canadian-Link Service on such CDS Business Day, including transactions with CDS Participants processed for such Participant through the DTC Omnibus Account and transactions with other Canadian-Link Participants processed for such Participant through accounts at DTC, and the net amount of money that DTC owes such Participant or that such Participant owes DTC with respect to such transactions. Then, in the following order, (i) Canadian-Link Participants with net settlement debits will pay DTC the amounts of such net settlement debits, (ii) DTC will pay CDS the amount of any net settlement debit owing to CDS or CDS will pay DTC the amount of any net settlement credit owing to DTC, and (iii) DTC will pay Canadian-Link Participants with net settlement credits the amounts of such net settlement credits. However, the amount of any net settlement credit owing to a Canadian-Link Participant

with respect to transactions processed for such Participant through the Canadian-Link Service may be withheld and applied to any obligation of such Participant to DTC or to any obligation of DTC to another registered clearing agency with respect to such Participant. DTC will not be required to make any payment to Canadian-Link Participants with net settlement credits unless and until DTC receives payment from all Canadian-Link Participants with net settlement debits and payment of any net amount of money that CDS owes DTC.

If a Canadian-Link Participant fails to pay any Canadian dollar net settlement debit with respect to the transactions processed for such Participant through the Canadian-Link Service. DTC may apply the DTC Participants Fund to cover any shortfall in its settlement obligations to CDS. If the day of such default is a DTC Business Day, DTC may either:

(1) Declare such Participant to be a Defaulting Participant, in which case DTC will have all of its rights and remedies under the Rules and Procedures of DTC, including the right to sell or to pledge (i) all securities credited to the DTC Omnibus Account at CDS for delivery to the Defaulting Participant, which securities are owned by DTC until they are paid for by the Participant, (ii) all securities provisionally credited to an account of the Defaulting Participant at DTC against payment, which securities are owned by DTC until they are paid for by the Participant, and (iii) all securities which are designated as additional Collateral by the Defaulting Participant pursuant to the Rules and Procedures of DTC or

(2) Translate the amount of such Canadian dollar net settlement debit into a U.S. dollar amount that will be added to or subtracted from, as the case may be, the U.S. dollar net settlement debit or credit of such Participant with respect to other transactions processed for such Participant through the facilities of DTC on that day and if as a result of this process such Participant has a net-net settlement debit with respect to all transactions processed for such Participant and fails to pay such net-net settlement debit to DTC, DTC may declare such Participant to be a Defaulting Participant and will have all of its rights and remedies under the Rules and Procedures of DTC, including the rights and remedies described above.

If the day of such default is not a DTC Business Day and as a result the amount of such Canadian dollar net settlement debit cannot be included in the calculation of the settlement obligations of such Participant with respect to other transactions processed by DTC for such Participant on that day, DTC will deem such Participant to be a Defaulting Participant and DTC will have all of its rights and remedies under the Rules and Procedures of DTC, including the rights and remedies described above. Any amounts withdrawn from the DTC Participants Fund to cover a shortfall in the settlement obligations of DTC to CDS will be restored to the Participants Fund (i) from any payments subsequently received by DTC from the Defaulting Participant and (ii) from any amounts derived by DTC from the operation of its failure to settle procedures and loss allocation rules.

8. Additional Matters

As a member of CDS, DTC must observe and comply with the Canadian-Link Documents. Each Canadian-Link Participant, in order to use the Canadian-Link Service, acknowledges that (i) all transactions processed for such Participant though the facilities of CDS are subject to the Canadian-Link Documents, (ii) the Canadian-Link Documents may include grants of security interests in and liens on securities and funds in the CDS system in which such Participant has an interest, (iii) there are other provisions of the Canadian-Link Documents that could also affect the interest of such Participant in such securities and funds, and (iv) in the event of any conflict between the Rules and Procedures of DTC, which are a contract between DTC and DTC Participants, and the Canadian-Link Documents, which are a contract between DTC and CDS, the requirements of the Canadian-Link Documents will prevail.

9. Fees

DTC is proposing to charge its Canadian-Link Participants the following fees. The fee schedule is set forth in Section 23 of the Canadian-Link Service Guide, which is attached as Exhibit 2 to this filing. All fees will be collected in U.S. dollars through the existing U.S. dollar settlement system and will be uniquely identified on the DTC U.S. dollar settlement statement bill. The proposed fees are as follows:

(1) Deliver Order Fees

DTC will charge $2.00 U.S. per submitted Canadian dollar delivery/receive, recall transaction resulting from the automatic recall process, cancel instruction and modify instruction. DTC will not charge for hold instructions of Canadian dollar deliveries/receives, DK instructions, confirm instructions, or end-of-day sweep transactions.

(2) Payment Order Fees

DTC will charge $2.00 U.S. per submitted Canadian dollar payment order delivery/receive, cancel instruction, and modify instruction. DTC will not charge for hold instructions of Canadian dollar payment order deliveries/receives, DK instructions, or confirm instructions.

(3) Asset Servicing/Custody Fees

DTC will charge for asset servicing and custody services on all Canadian and U.S. securities at the existing DTC Asset Servicing/Custody fees.

10. Statutory Basis for the Proposed Rule Change

Section 17A of the Act requires that DTC be so organized and its rules designed to facilitate and promote the prompt and accurate clearance and settlement of securities transactions. DTC believes that the Canadian-Link Service will promote the prompt and accurate clearance and settlement of cross-border securities transactions between DTC Participants and CDS Participants and between DTC Participants and other DTC Participants in a secure, efficient and regulated environment. DTC also believes that the Canadian-Link Service will more efficiently link the facilities of DTC and CDS to maximize service to their respective Participants and to minimize the duplication of effort and expense. Additionally, the proposed fees are consistent with DTC's policy to price its services commensurate with DTC's costs and to equitably allocate the costs among the users of the services.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments relating to the proposed rule change have been solicited or received by DTC from members, participants, or other persons. DTC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i)

as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve the proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–DTC–2005–08 on the subject line.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–DTC–2005–08. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at *https://login.dtcc.com/dtcorg.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2005–08 and should be submitted on or before October 17, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–5171 Filed 9–23–05; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52458; File No. SR–NSCC–2005–10]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Mutual Fund Commission Settlement Service

September 16, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on August 11, 2005, NSCC filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will permit an NSCC Rule 2 member[2] to submit fee data through NSCC to another NSCC Rule 2 member and have the payments settle through NSCC. Prior to this rule change, the Mutual Fund Commission Settlement service allowed such members to submit only commission data.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to amend NSCC Rule 52, Section C regarding NSCC's Mutual Fund Commission Settlement service by permitting a Rule 2 member to submit fee data through NSCC to another NSCC Rule 2 member and have the payment settle through NSCC. Prior to this rule change, the Mutual Fund Commission Settlement service allowed such members to submit only commission data.

NSCC believes that the new functionality to submit fee data should be useful in the context of processing mutual fund transactions for retirement plans in which a Rule 2 member may offer plan programs involving multiple mutual funds for which it acts as a recordkeeper or as a broker-dealer for multiple funds offered in the plan program. In this capacity, the Rule 2 member may receive a fee from the funds in connection with transactions in such funds for which it seeks to pay an amount over to another Rule 2 member that directed the purchase of certain of the fund shares in the plan.

Prior to this rule change, fees were frequently paid by checks sent through the mail. This practice carried the risk that checks may be lost or misdirected and errors may occur during the costly and manually intensive processing and reconciliation of check payments. Permitting settlement of these broker-to-broker fees through NSCC in the same manner that fund-to-broker fees are paid through NSCC should enable the fee payments to be made with greater efficiency and transparency in a secure, automated, and operationally efficient process.

The proposed rule change also deletes Rule 52(C), Section 4, which set forth procedures for members to correct a prior commission payment because NSCC's system processes correction data in the same manner that all other commission and fee related data is processed and the special provisions are not applicable.

NSCC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder because it

[5] 17 CFR 200.30–3(a)(12).

[1] 1 15 U.S.C. 78s(b)(1).

[2] Members admitted under NSCC Rule 2 may be admitted to use all NSCC services or they may be admitted to use NSCC's mutual fund and insurance processing services only.

will facilitate the accurate clearance and settlement of transactions.

B. Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have any impact or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not solicited or received written comments relating to the proposed rule change. NSCC will notify the Commission if it receives any written comments.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) [3] of the Act and Rule 19b–4(f)(4) [4] thereunder because it effects a change in an existing service of NSCC that does not adversely affect the safeguarding of securities or funds in NSCC's control or for which NSCC is responsible and does not significantly affect NSCC's or its participants' respective rights or obligations. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSCC–2005–10 on the subject line.

Paper Comments

Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303. All submissions should refer to File Number SR–NSCC–2005–10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at NSCC's principal office and on NSCC's Web site (*http://www.nscc.com/legal/index.html*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2005–10 and should be submitted on or before October 17, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–5172 Filed 9–23–05; 8:45 am]

BILLING CODE 8010–01–P

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(4).

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52468; File No. SR–NYSE–2005–48]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change to Provide for a 10-Day Notice Requirement Before a Party Issues a Subpoena to a Non-Party for Pre-Hearing Discovery

September 19, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 19b–4 [2] thereunder, notice is hereby given that on July 13, 2005, the New York Stock Exchange, Inc. (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE is proposing to amend Rule 619 (''General Provision Governing Subpoenas, Production of Documents, etc.'') primarily to provide for a 10-day notice period requirement before a party issues a subpoena to a non-party for pre-hearing discovery. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

Rule 619: General Provision Governing Subpoenas, Production of Documents, etc.

(a) to (e) no change.

(f) Subpoenas.

(1) The arbitrator(s) and any counsel of record to the proceedings [shall have the power of the subpoena process] *may issue subpoenas* as provided by law. [All parties shall be given a copy of the subpoena upon its issuance.] *The party who requests or issues a subpoena must send a copy of the request or subpoena to all parties and the entity receiving the subpoena in a manner that is reasonably expected to cause the request or subpoena to be delivered to all parties and the entity receiving the subpoena on the same day.* The parties shall produce witnesses and present [proofs to the fullest extent possible without resort to the subpoena process] *proof at the hearing whenever possible without using subpoenas.*

(2) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.

(3) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within the 10 days prior to the issuance or service of the subpoena, file with the Director of Arbitration, with copies to all other parties, written objections. The party seeking to issue or serve the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

subpoena may respond thereto. The arbitrator(s) appointed shall rule promptly on the issuance and scope of the subpoena.

(4) In the event an objection to a subpoena is filed under paragraph (f)(3), the subpoena may only be issued or served prior to the arbitrator's(s') ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator(s).

(5) Rule 619(f)(2) and (3) do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrator(s).

(6) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

(g) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Parties in arbitration often seek the production of documents from third parties as part of pre-hearing discovery. Exchange Rule 619 sets forth procedures for the issuance of subpoenas and for the production of documents. The rule provides that arbitrators and attorneys for the parties have subpoena powers as provided by law, and that all parties are to be given copies of subpoenas when issued.

Under the current procedures, the opposing attorney may not receive notice of the subpoena until after it has been served on a non-party. In such situations, non-parties may produce documents that are the subject of dispute as to whether they should be produced at all. This has led to court action to have subpoenas quashed, which adds expense and delay to the arbitration process. Under the proposed amendments, the arbitrators, rather the courts, would rule on these discovery disputes.

Under the proposed rule, the party who requests or issues a subpoena must send a copy of the request or subpoena to all parties to the arbitration, and to non-parties, if applicable, in a manner reasonably expected to result in delivery to everyone on the same day.

As amended, the rule provides that subpoenas can be issued to non-parties only after all parties have ten days advance notice and the opportunity to file objections. If a party has an objection to the propriety or scope of the subpoena, that party may file objections in writing with the Director of Arbitration and send copies to all other parties within the ten-day period prior to the issuance or service of the subpoena. The party requesting the subpoena may file a reply to objections. The arbitrator(s) shall determine the propriety and scope of the requested subpoena(s).

Additionally, as amended, the rule provides that non-parties must be advised that documents subpoenaed are to be preserved but not delivered pending any determination that may be required by the arbitrator(s). Furthermore, the proposed rule does not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrator(s).[3] The proposed rule also provides that the arbitrator(s) may quash or limit the scope of subpoena(s).

The proposed amendments are based on the Securities Industry Conference on Arbitration's Uniform Code of Arbitration.

2. Statutory Basis

The proposed changes are consistent with Section 6(b)(5)[4] of the Act in that they promote just and equitable principles of trade by ensuring that members and member organizations and the public have a fair and impartial forum for the resolution of their disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[3] Telephone conversation between Karen Kupersmith, Director of Arbitration, NYSE, and Michael Hershaft, Attorney Adviser, Division of Market Regulation, Commission (Sept. 15, 2005).

[4] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2005–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NYSE–2005–48. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File number SR–NYSE–2005–48 and should be submitted on or before October 17, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. E5–5173 Filed 9–23–05; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 06/76–0330]

SunTx Fulcrum Fund II—SBIC, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that SunTx Fulcrum Fund II—SBIC, L.P., 14001 N. Dallas Parkway, Suite 111, Dallas, Texas 75240, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') rules and regulations (13 CFR 107.730 (2002)). SunTx Fulcrum Fund II—SBIC, L.P. proposes to invest in Interface Security Systems Holdings, Inc. (''Interface''). The financing will provide the funding for the future acquisitions.

The financing is brought within the purview of Sec. 107.730(a) and Section 107.730(d) of the Regulations because SunTx Fulcrum Fund, L.P. and SunTx Fulcrum Dutch Investors, L.P., Associates of SunTx Fulcrum Fund II—SBIC, L.P., owns 93.87% of the existing and outstanding ownership of Interface.

Therefore, this transaction is considered financing of an Associate requiring prior SBA approval.

[5] 17 CFR 200.30–3(a)(12).

Notice is hereby given that any interested person may submit written comments on the transaction, within 15 days of the date of this publication, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: September 19, 2005.

Jaime Guzman-Fournier,

Associate Administrator For Investment.

[FR Doc. 05–19101 Filed 9–23–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Photographic Film, Paper, Plate, and Chemical Manufacturing.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Photographic Film, Paper, Plate, and Chemical Manufacturing. The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before October 7, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act, (Act) 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406 (b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFE 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System* (*NAICS*). The second is the Product and Service Code required as a data entry field by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Photographic Film, Paper, Plate, and Chemical Manufacturing, North American Industry Classification System (NAICS) 325992. The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: September 15, 2005.

Karen C. Hontz,

Associate Administrator for Government Contracting.

[FR Doc. 05–19100 Filed 9–23–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Household Refrigerator Equipment.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Household Refrigerator Equipment. The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of

this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before October 7, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act, (Act) 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406(b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFR 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System* (*NAICS*). The second is the Product and Service Code required as a data entry field by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Household Refrigerator Equipment, North American Industry Classification System (NAICS) 423620.

The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: September 15, 2005.

Karen C. Hontz,

Associate Administrator for Government Contracting.

[FR Doc. 05–19102 Filed 9–23–05; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Business Size Standards: Waiver of the Nonmanufacturer Rule

AGENCY: U.S. Small Business Administration.

ACTION: Notice of intent to waive the Nonmanufacturer Rule for Commercial Refrigerator Equipment.

SUMMARY: The U.S. Small Business Administration (SBA) is considering granting a waiver of the Nonmanufacturer Rule for Commercial Refrigerator Equipment. The basis for waivers is that no small business manufacturers are supplying these classes of products to the Federal government. The effect of a waiver would be to allow otherwise qualified regular dealers to supply the products of any domestic manufacturer on a Federal contract set aside for small businesses, service disabled veteran-owned small businesses or SBA's 8(a) Business Development Program. The purpose of this notice is to solicit comments and potential source information from interested parties.

DATES: Comments and sources must be submitted on or before October 7, 2005.

FOR FURTHER INFORMATION CONTACT: Edith Butler, Program Analyst, by telephone at (202) 619–0422; by FAX at 481–1788; or by e-mail at *edith.butler@sba.gov.*

SUPPLEMENTARY INFORMATION: Section 8(a)(17) of the Small Business Act, (Act) 15 U.S.C. 637(a)(17), requires that recipients of Federal contracts set aside for small businesses, service-disabled veteran-owned small businesses, or SBA's 8(a) Business Development Program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor. This requirement is commonly referred to as the Nonmanufacturer Rule.

The SBA regulations imposing this requirement are found at 13 CFR 121.406 (b). Section 8(a)(17)(b)(iv) of the Act authorizes SBA to waive the Nonmanufacturer Rule for any ''class of products'' for which there are no small business manufacturers or processors in the Federal market.

As implemented in SBA's regulations at 13 CFR 121.1204, in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or received a contract from the Federal government within the last 24 months. The SBA defines ''class of products'' based on six digit coding systems. The first coding system is the Office of Management and Budget *North American Industry Classification System (NAICS).* The second is the Product and Service Code required as a data entry field by the Federal Procurement Data System.

The SBA is currently processing a request to waive the Nonmanufacturer Rule for Commercial Refrigerator Equipment, North American Industry Classification System (NAICS) 423740.

The public is invited to comment or provide source information to SBA on the proposed waiver of the nonmanufacturer rule for this NAICS code.

Authority: 15 U.S.C. 637(A)(17).

Dated: September 15, 2005.

Karen C. Hontz,

Associate Administrator for Government Contracting.

[FR Doc. 05–19103 Filed 9–23–05; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the extension of tests involving modifications to the disability determination procedures.

SUMMARY: We are announcing the extension of tests involving modifications to our disability determination procedures that we are conducting under the authority of current rules codified at 20 CFR 404.906 and 416.1406. These rules provide authority to test several modifications to the disability determination procedures that we normally follow in adjudicating claims for disability insurance benefits under title II of the Social Security Act (the Act) and for supplemental security income payments based on disability under title XVI of the Act. On July 27, 2005, we published a Notice of Proposed Rulemaking that described an approach to improve the disability determination process. We have decided to extend the testing of two redesign features of the disability prototype for 12 months to ensure a smooth transition while these changes to the disability determination process are being finalized and implemented.

DATES: We are extending our selection of cases to be included in these tests from September 30, 2005 until no later than September 30, 2006. If we decide

to continue selection of cases for these tests beyond this date, we will publish another notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Phil Landis, Office of Disability Determinations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, 410–965–5388.

SUPPLEMENTARY INFORMATION: Current regulations at 20 CFR 404.906 and 416.1406 authorize us to test, individually, or in any combination, different modifications to the disability determination procedures. We have conducted several tests under the authority of these rules, including a prototype that incorporates a number of modifications to the disability determination procedures that the State agencies use. The prototype included three redesign features, and we previously extended the tests of two of those features: the use of a single decisionmaker, in which a disability examiner may make the initial disability determination in most cases without requiring the signature of a medical consultant; and elimination of the reconsideration level of review. We are now announcing a further extension of the testing of these two features.

We also have conducted another test involving the use of a single decisionmaker who may make the initial disability determination in most cases without requiring the signature of a medical consultant. We are also extending the period during which we will select cases to be included in this test of the single decisionmaker feature.

Extension of Testing of Some Disability Redesign Features

On August 30, 1999, we published in the **Federal Register** a notice announcing a prototype that would test a new disability claims process in 10 States, also called the prototype process (64 FR 47218). On December 23, 1999, we published a notice in the **Federal Register** (65 FR 72134) extending the period during which we would select cases to be included in a separate test of the single decisionmaker feature. In these notices, we stated that selection of cases was expected to be concluded on or about December 31, 2001. We also stated that, if we decided to continue the tests beyond that date, we would publish another notice in the **Federal Register.** We subsequently published notices in the **Federal Register** extending selection of cases for these tests. Most recently, on December 10, 2003, we published a notice extending selection of cases for the tests until no later than September 30, 2005 (68 FR 68963). We also stated that, if we decided to continue selection of cases for these tests beyond that date, we would publish another notice in the **Federal Register**. We have decided to extend selection of cases for two features of the prototype process (single decisionmaker and elimination of the reconsideration step), and the separate test of single decisionmaker beyond September 30, 2005. We expect that our selection of cases for these tests will end on or before September 30, 2006.

This extension also applies to the locations in the State of New York that we added to the prototype test in a notice published in the **Federal Register** on December 26, 2000 (65 FR 81553).

Dated: September 16, 2005.

Martin H. Gerry,

Deputy Commissioner for Disability and Income Security Programs.

[FR Doc. 05–19123 Filed 9–23–05; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 5194]

Bureau of International Security and Nonproliferation; Extension of Waiver of Missile Proliferation Sanctions Against Chinese Government Activities

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made to extend the waiver of import sanctions against certain activities of the Chinese Government that was announced on September 19, 2003, pursuant to the Arms Export Control Act, as amended.

EFFECTIVE DATE: September 18, 2005.

FOR FURTHER INFORMATION CONTACT: Vann H. Van Diepen, Office of Chemical, Biological and Missile Nonproliferation, Bureau of International Security and Nonproliferation, Department of State (202–647–1142).

SUPPLEMENTARY INFORMATION: A determination was made on March 17, 2005, pursuant to section 73(e) of the Arms Export Control Act (22 U.S.C. 2797b(e)) that it was essential to the national security of the United States to waive for a period of six months the import sanction described in Section 73(a)(2)(C) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(C)) against the activities of the Chinese Government described in section 74(a)(8)(B) of the Arms Export Control Act (22 U.S.C. 2797c(a)(8)(B))—*i.e.*, activities of the Chinese government relating to the development or production of any missile equipment or technology and activities of the Chinese government affecting the development or production of electronics, space systems or equipment, and military aircraft (see **Federal Register** Vol. 68, No. 182, Friday, Sept. 19, 2003). This action was effective on March 18, 2005.

On September 14, 2005, a determination was made pursuant to section 73(e) of the Arms Export Control Act (22 U.S.C. 2797b(e)) that it is essential to the national security of the United States to extend the waiver period for an additional six months, effective from the date of expiration of the previous waiver (September 18, 2005).

These measures shall be implemented by the responsible agencies as provided in Executive Order 12851 of June 11, 1993.

Dated: September 21, 2005.

Stephen G. Rademaker,

Acting Assistant Secretary of State for International Security and Nonproliferation, Department of State.

[FR Doc. 05–19274 Filed 9–23–05; 8:45 am]

BILLING CODE 4710–27–P

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Tennessee Valley Authority (Meeting No. 1561).

TIME AND DATE: 9 a.m. (EDT), September 28, 2005; TVA West Tower Auditorium, 400 West Summit Hill Drive, Knoxville, Tennessee.

STATUS: Open.

AGENDA: Approval of minutes of meeting held on July 22, 2005.

New Business

E—Real Property Transactions

E1. Sale at public auction of approximately 578 acres of TVA land on Nickajack Reservoir in Marion County, Tennessee, Tract No. XNJR–21.

E2. Sale of a permanent easement to Dennis Patel for an access road to a new Hampton Inn, affecting approximately .3 acre of TVA land on Guntersville Reservoir in Marion County, Tennessee, Tract No. XGR–763AR.

E3. Grant of a 30-year term public recreation easement, with conditional options to renew for additional 30-year terms, affecting approximately 20.3 acres of TVA land on Douglas Reservoir in Jefferson County, Tennessee, Tract No. XTDR–36RE.

E4. Modification of certain deed restrictions affecting approximately 93

acres of former TVA land on Chickamauga Reservoir in Hamilton County, Tennessee, Tract No. XCR–53, S.1X, to allow residential development on 18 acres of said tract and prohibit development (other than roads and infrastructure) upon the remaining 75 acres of the tract.

E5. Modification of certain deed restrictions affecting approximately 16.8 acres of former TVA land on Melton Hill Reservoir in Anderson County, Tennessee, Tract No. XMHR–49, S.1X, to allow the city of Clinton, Tennessee, to develop a sports complex on the property and approval of a land use allocation change to the Melton Hill Reservoir Land Management Plan to reallocate a .9-acre portion of this tract from industrial development to recreational development.

F—Other

F1. Approval to file condemnation cases to acquire easements and rights-of-way for transmission line projects affecting the Richard City—Scottsboro Transmission Line in Jackson County, Alabama.

C—Energy

C1. Delegation of authority to the Executive Vice President, Fossil Power Group, to enter into a term contract with Canal Barge Company Inc. for barge transportation of coal to Colbert and Johnsonville Fossil Plants.

Information Items

1. Approval of Board member participation in Board meetings by telephone or other means due to incapacity for the period beginning September 12, 2005, and extending through December 31, 2005.

2. Approval of a plan to match cash or check contributions by employees or retirees through the CFC to Hurricane Katrina relief organizations for the period September 2–16, 2005.

3. Approval of temporary policy revisions related to distributors who have given notice of contract termination.

4. Approval of changes to the risk management structure at TVA.

5. Approval of delegation of authority to the Director, TVA Police, to designate TVA employees as law enforcement officers for an interim period commencing on August 22, 2005, and ending December 31, 2005.

6. Approval of a contract with Blue Cross Blue Shield of Tennessee for dental benefit services.

7. Approval of the sale at public auction of the Aquatic Biology Lab Buildings, affecting approximately 3.2 acres, Tract No. XNR–911, and an associated utility easement, Tract No. XNR–912E, in Norris, Tennessee.

8. Approval to enter into a contract with Staples Business Advantage for office supplies, equipment, and forms management services.

9. Approval of the sale at public auction of leasehold interests to the Public Power Institute building and of approximately 1.9 acres of associated land on TVA's Muscle Shoals Reservation in Colbert County, Alabama, Tract No. X2NPT–21.

10. Approval of modifications to grants of easements affecting 52 acres of land on the Wilson Dam Reservation in Lauderdale County, Alabama, to facilitate the construction and operation of a public park and an adjacent hotel/convention center complex, Tract Nos. XWDNC–1E, XTWDNC–1RE, and XWDR–9E.

11. Approval of abandonment of certain transmission line easement rights affecting approximately 1.43 acres, Tract Nos. BWG–5 and BWG–6, contingent upon Blue Ridge Mountain EMC providing transmission line easement rights satisfactory to TVA affecting approximately 2.07 acres of land, Tract No. BWG–5A, all in Union County, Georgia.

12. Approval of a membership appointment of Don Gowan to the Regional Resource Stewardship Council.

13. Approval of TVA's contribution to the TVA Retirement System for Fiscal Year 2006.

14. Approval of the 2005 edition of the Transmission Service Guidelines.

For more information: Please call TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 898–2999. People who plan to attend the meeting and have special needs should call (865) 632–6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: September 21, 2005.

Maureen H. Dunn,

General Counsel and Secretary.

[FR Doc. 05–19231 Filed 9–22–05; 3:29 pm]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with part 211 of title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

The Rarus Railway Company

[Waiver Petition Docket Number FRA–2005–22131]

The Rarus Railway Company (RAR), seeks a waiver of compliance from certain provisions of the Safety Glazing Standards, 49 CFR 223, that requires certified glazing for two passenger cars, RARW 802 and RARW 805. The RAR is located in Anaconda, Montana. The RAR states they operate as a seasonal excursion train and will not operate as a commuter railroad. The cars will operate in a rural area over approximately 26 miles of track at a speed not exceeding 25 miles per hour. The RAR states that the cost of retrofitting a total of 58 windows for each car to accept FRA safety glazing will be cost prohibitive with consideration given to the type of operation the RAR performs.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number 2005–22131) and must be submitted to the Docket Clerk, DOT Docket Management Facility, Room PL–401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590. Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://dms.dot.gov.*

Anyone is able to search the electronic form of all comments received into any of our dockets by the

name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78). The Statement may also be found at *http://dms.dot.gov.*

Issued in Washington, DC on September 19, 2005.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 05–19093 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice Publishing Substantive Criteria for Evaluation of Applications under the Railroad Rehabilitation and Improvement Financing Program (RRIF)

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of Evaluation Criteria for RRIF Program.

SUMMARY: FRA is publishing this notice in response to Congressional direction contained in section 9003(j) of the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) requesting the agency to identify the substantive criteria and standards used by the DOT/FRA to determine whether to approve or disapprove applications submitted under the RRIF Program. This information is being provided by publication in the **Federal Register** and posting on the DOT/FRA website, as required by the statute.

FOR FURTHER INFORMATION CONTACT: Joseph Pomponio, Director, Office of Freight Programs, Federal Railroad Administration, U.S. Department of Transportation, 1120 Vermont Avenue, NW., Washington, DC 20590. Telephone: 202–493–6051, e-mail: *Joseph.Pomponio@fra.dot.gov.* Cynthia Walters, Attorney, Office of Chief Counsel, Federal Railroad Administration, U.S. Department of Transportation, 1120 Vermont Avenue, NW., Washington, DC 20590. Telelphone 202–493–6064, e-mail: *Cynthia.Walters@fra.dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

Congress recently amended sections 502 and 503 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 821 *et seq.*), in SAFETEA–LU (Pub. L. 109–59). These amendments address DOT's RRIF program, which authorizes the Secretary of Transportation (Secretary) to disburse money through direct loans and loan guarantees to various entities. RRIF loans and loan guarantees are used to acquire, improve or rehabilitate intermodal or rail equipment and facilities, refinance debt that was undertaken for such purposes, or to develop or establish new rail or intermodal facilities. The SAFETEA–LU amendments expand the total available program obligations from $3.5 billion to $35 billion and make several other program changes. The Secretary's authority to administer this program has been delegated to the Administrator of FRA (49 CFR sections 1.49(t) and 260.1, Program Authority).

In addition to the RRIF program changes, SAFETEA–LU requires the Department, within thirty days after enactment of the statute, to publish in the **Federal Register** and post on the Department's Web site the substantive criteria and standards used by the Secretary to determine whether applications will be approved or disapproved for RRIF loans. The substantive criteria responsive to the request of Congress are the subject of this notice and are described below.

FRA's Substantive Criteria for Evaluation of RRIF Applications

FRA is providing the criteria and standards used to determine whether to approve or disapprove an application submitted under section 502 of the Railroad Revitalization and Regulatory Reform Act of 1976. These criteria are drawn from the legislation authorizing the RRIF program (45 U.S.C. 821 *et seq.*) and program implementing regulations (49 CFR part 260). The words used below to describe the criteria differ from the statute and the regulations only for purposes of brevity. This notice does not contain any new criteria or impose any new legal requirements or have any legal effect other than to satisfy the mandate from Congress to issue this notice. Determinations are made based on the following criteria and standards, as more fully set forth in the statute or the regulations, evaluated individually and considered collectively.

- The statutory eligibility of the applicant and the project (49 CFR 260.3, definition of applicant and 49 CFR 260.5, eligible purposes);
- The creditworthiness of the project, including the present and probable demand for rail services and a reasonable likelihood that the loan will be repaid on a timely basis. (49 CFR part 260, Subpart B–FRA policies and procedures for Evaluating Applications for Financial Assistance)
- The extent to which the project will enhance safety. (49 CFR 260.7(a))
- The significance of the project on a local, regional, or national level in terms of generating economic benefits and improving the railroad transportation system. (49 CFR 260.7(c))
- The improvement to the environment that is expected to result directly or indirectly by the implementation of the project. (49 CFR 260.7(b)) and
- The improvement in service or capacity in the railroad transportation system or the reduction in service-or capacity-related problems that is expected to result directly or indirectly from the implementation of the project (45 U.S.C. 822(c))

Issued in Washington, DC on September 19, 2005.

Joseph H. Boardman,

Federal Railroad Administrator.

[FR Doc. 05–19094 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2005–21859; Notice 2]

Toyota Motor North America, Inc., Denial of Petition for Decision of Inconsequential Noncompliance

Toyota Motor North America (Toyota) has determined that certain model year 2003 through 2005 vehicles that it produced do not comply with S5(c)(2) of 49 CFR 571.225, Federal Motor Vehicle Safety Standard (FMVSS) No. 225, ''Child restraint anchorage systems.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), Toyota has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR Part 573, ''Defect and Noncompliance Reports.'' Notice of receipt of the petition was published, with a 30 day comment period, on July 19, 2005 in the **Federal Register** (70 FR 41476). NHTSA received one comment, from Advocates for Highway and Auto Safety (Advocates).

Affected are a total of approximately 156,555 model year 2003 to 2005 Toyota

Tundra access cab vehicles produced between September 1, 2002 and April 22, 2005. S5(c)(2) of FMVSS No. 225 requires each vehicle that

(i) Has a rear designated seating position and meets the conditions in S4.5.4.1(b) of Standard No. 208 * * * and, (ii) Has an air bag on-off switch meeting the requirements of S4.5.4 of Standard 208 * * * shall have a child restraint anchorage system for a designated passenger seating position in the front seat, instead of a child restraint anchorage system that is required for the rear seat * * *.

The subject vehicles do not have a child restraint lower anchorage in the front seat as required by S5(c)(2).

Toyota believes that the noncompliance is inconsequential to motor vehicle safety and that no corrective action is warranted. Toyota states that it considered whether rear-facing child restraints could be used in the noncompliant vehicles, and ''is unaware of any rear-facing child restraints that require lower anchorages in the vehicle.'' Toyota further states,

Most, if not all rear facing child restraints (even those with lower anchorage systems), have belt paths which allow the child restraint to be secured properly in the front passenger seat of the subject vehicles utilizing the front passenger seatbelt. We also note that child restraint manufacturers provide instructions with their child seats (even lower anchorage equipped child seats) on how to install their restraint with the seatbelt. In addition, all Toyota Tundra vehicles provide instructions on how to install child restraints with the seatbelt.

The public comment by Advocates in response to the **Federal Register** notice states that Toyota's rationale ''does not obviate the fact that front passenger seating positions were required to be equipped with LATCH [lower anchors and tethers for children] because LATCH systems more readily ensure the proper installation of child restraints and, therefore, are safer than using vehicle seat belts,'' as well as being likely to lead to increased child restraint use due to ease of use.

NHTSA agrees with Advocates that the absence of LATCH anchorages compromises the overall level of safety of child restraints. FMVSS No. 225 requires a simple, uniform system for installing child restraints that increases the likelihood of proper installation. Prior to FMVSS No. 225 many child restraints were improperly installed, increasing the safety risk to children riding in the improperly installed child restraints. Therefore, it is reasonable to conclude that noncompliant vehicles do not offer the same level of safety as compliant vehicles because of the increased risk of improper child restraint installation.

Toyota further points out that model year 2000 to 2002 Tundra access cab vehicles have a front passenger airbag on-off switch as standard equipment but not lower anchorage system because they were produced prior to the effective date of the FMVSS No. 225 lower anchorage requirement with which the subject vehicles noncomply. Toyota asserts that,

considering child restraint installation in the front passenger seat, the 2003–2005 MY vehicles (subject vehicles) are no different than the 2000–02 MY vehicles and further, it follows that the subject vehicles are no less safe than the 2000–02 MY vehicles.

Advocates responds by pointing out that the promulgation of FMVSS No. 225 was justified by the additional safety it would provide. ''[F]ewer child deaths and many fewer injuries are expected to result from widespread use of the LATCH system. * * * [and] it will result in far fewer children being exposed to the risk of riding in an improperly installed child restraint.'' NHTSA agrees with Advocates that the noncompliant vehicles offer a lower level of child passenger safety than those which comply with the requirements of FMVSS No. 225, which is why the standard was promulgated.

Toyota further states that it considered

whether a lower anchorage child restraint can be mistakenly installed in the front passenger seat attempting to utilize the lower anchorage. Upon investigating the seat bight of the subject vehicles, we believe a current vehicle owner or subsequent owner could easily observe that no lower anchorage bars exist. We would also note that there are no portions of the seat frame within the seat bight of the front passenger seat that may be mistaken for lower anchorage bars.

In response to this assertion, Advocates states that it is ''beside the point that vehicle owners will not mistakenly attempt to use the nonexistent LATCH system * * * The issue is that the noncompliance * * * denies owners and parents the safer LATCH alternative that is required by law.''

NHTSA agrees that this argument by Toyota is beside the point in terms of consequentiality to safety. Additionally, through NHTSA's child passenger safety working group, many examples of misuse have been presented. Parents who mistakenly believe their vehicles have LATCH (pre-2002 vehicles) have used seatbelt latch plates, drilled holes through the nylon webbing of the seatbelt or seatbelt buckle stalk, and attached seats to the seat support structure or other places within the vehicle that can be hooked to, all in attempts to secure the child restraint using the LATCH system. In this particular case, the owner's manual for the Toyota Tundra provides instruction for installing a child restraint using the LATCH system, even though one is not available. A parent might take an improper action, as described previously, in an attempt to ''find'' the LATCH system or ''create'' a LATCH system, resulting in the improper installation of the child restraint. Therefore, the lack of the required LATCH system is consequential to safety.

Finally, Toyota notes that it has not received customer complaints regarding the absence of a front passenger seat child restraint lower anchorage system, nor has it received any reports of a crash, injury or fatality due to this noncompliance. NHTSA does not consider the absence of these reports to be compelling evidence of the inconsequentiality of this noncompliance to safety.

In consideration of the foregoing, NHTSA has decided that the petitioner has not met its burden of persuasion that the noncompliance described is inconsequential to motor vehicle safety. Accordingly, Toyota's petition is hereby denied.

Authority: (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8).

Issued on: September 19, 2005.

Ronald L. Medford,

Senior Associate Administrator for Vehicle Safety.

[FR Doc. 05–19092 Filed 9–23–05; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34747]

Central Puget Sound Regional Transit Authority—Acquisition Exemption—BNSF Railway Company

The Central Puget Sound Regional Transit Authority (Sound Transit), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from BNSF Railway Company (BNSF) two lines of railroad, totaling approximately 22.35 miles on the Lakeview Subdivision located in Pierce County, WA. The rail lines are as follows: (1) The Lakeview North Segment, between milepost 2.15 in Tacoma and milepost 8.9 in Lakeview, and (2) the Lakeview South Segment, between milepost 8.9 in Lakeview and milepost 24.5 in Nisqually.

At the time of filing of the verified notice, Sound Transit and BNSF had

executed purchase and sale agreements with respect to both segments. Sound Transit explains that it acquired the Lakeview North Segment on September 28, 2004,[1] and that it plans to acquire the Lakeview South Segment on September 28, 2005. Sound Transit states that, pursuant to the purchase and sale agreements, BNSF initially retained an exclusive freight easement with respect to operation of freight trains on the two line segments. It adds, however, that BNSF subsequently transferred its freight common carrier easement with respect to both segments to the City of Tacoma, WA, d/b/a Tacoma Rail, subject to retained trackage rights along a portion of the line it conveyed to the City. *City of Tacoma, Department of Public Utilities, Beltline Division, d/b/a Tacoma Rail or Tacoma Municipal Beltline or TMBL—Acquisition and Operation Exemption—Lakeview Subdivision, Quadlok-St. Clair and Belmore-Olympia Rail Lines in Pierce and Thurston Counties, WA,* STB Finance Docket No. 34555 (STB served Oct. 19, 2004). Sound Transit indicates that it is acquiring the two line segments for the purpose of providing wholly intrastate commuter rail passenger operations, and that it will not be providing rail freight service over the lines.[2]

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to reopen the proceeding to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34747, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Charles A. Spitulnik, McLeod, Watkinson & Miller, One Massachusetts Avenue, NW., Suite 800, Washington, DC 20001.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov*.

Decided: September 16, 2005.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 05–18944 Filed 9–23–05; 8:45 am]

BILLING CODE 4915–01–P

[1] Sound Transit should have sought acquisition authority (accompanied by any motion to dismiss it wished to file) for the Lakeview North Segment when it acquired it in September 2004. Sound Transit is cautioned in the future to seek authority at the time of the transaction.

[2] For these reasons, Sound Transit has simultaneously filed a motion to dismiss the notice of exemption in this proceeding. The motion will be addressed in a subsequent Board decision.

Federal Register

Monday,

September 26, 2005

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife Plants; Designation of Critical Habitat for the Bull Trout; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AJ12; 1018–AU31

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Bull Trout

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Klamath River, Columbia River, Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River populations of bull trout (*Salvelinus confluentus*) in the coterminous United States pursuant to the Endangered Species Act of 1973, as amended (Act). This final designation totals approximately 3,828 miles (mi) (6,161 kilometers (km) of streams, 143,218 acres (ac) (57,958 hectares (ha) of lakes in Idaho, Montana, Oregon, and Washington, and 985 mi (1,585 km) of shoreline paralleling marine habitat in Washington. We solicited data and comments from the public on all aspects of the proposed rules, including data on economic and other impacts of the designations.

DATES: This rule becomes effective October 26, 2005.

ADDRESSES: Comments received, as well as supporting documentation used in the preparation of this final rule, will be available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Avenue, Portland, OR 97232. The final rule, economic analyses, and maps are also available via the Internet at *http://pacific.fws.gov/bulltrout/.*

FOR FURTHER INFORMATION CONTACT: Branch of Endangered Species (see **ADDRESSES** section), telephone, facsimile 503/231–6237.

SUPPLEMENTARY INFORMATION:

Role of Critical Habitat in Actual Practice of Administering and Implementing the Act

Attention to and protection of habitat is paramount to successful conservation actions. The role that designation of critical habitat plays in protecting habitat of listed species, however, is often misunderstood. As discussed in more detail below in the discussion of exclusions under ESA section 4(b)(2), there are significant limitations on the regulatory effect of designation under ESA section 7(a)(2). In brief, (1) designation provides additional protection to habitat only where there is a federal nexus; (2) the protection is relevant only when, in the absence of designation, destruction or adverse modification of the critical habitat would in fact take place (in other words, other statutory or regulatory protections, policies, or other factors relevant to agency decision-making would not prevent the destruction or adverse modification); and (3) designation of critical habitat triggers the prohibition of destruction or adverse modification of that habitat, but it does not require specific actions to restore or improve habitat.

Currently, only 470 species, or 37 percent of the 1,264 listed species in the U.S. under the jurisdiction of the Service, have designated critical habitat. We address the habitat needs of all 1,264 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, the Section 10 incidental take permit process, and cooperative, nonregulatory efforts with private landowners. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

In considering exclusions of areas originally proposed for designation, we evaluated the benefits of designation in light of *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*. In that case, the Ninth Circuit invalidated the Service's regulation defining ''destruction or adverse modification of critical habitat.'' In response, on December 9, 2004, the Director issued guidance to be considered in making section 7 adverse modification determinations. This critical habitat designation does not use the invalidated regulation in our consideration of the benefits of including areas in this final designation. The Service will carefully manage future consultations that analyze impacts to designated critical habitat, particularly those that appear to be resulting in an adverse modification determination. Such consultations will be reviewed by the Regional Office prior to finalizing to ensure that an adequate analysis has been conducted that is informed by the Director's guidance.

On the other hand, to the extent that designation of critical habitat provides protection, that protection can come at significant social and economic cost. In addition, the mere administrative process of designation of critical habitat is expensive, time-consuming, and controversial. The current statutory framework of critical habitat, combined with past judicial interpretations of the statute, make critical habitat the subject of excessive litigation. As a result, critical habitat designations are driven by litigation and courts rather than biology, and made at a time and under a time frame that limits our ability to obtain and evaluate the scientific and other information required to make the designation most meaningful.

In light of these circumstances, the Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

Procedural and Resource Difficulties in Designating Critical Habitat

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs. The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed. The accelerated schedules of court-ordered designations have left the Service with limited ability to provide for public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals, due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, and is very expensive, thus diverting resources from conservation actions that may provide relatively more benefit to imperiled species. The costs resulting from the

designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). These costs, which are not required for many other conservation actions, directly reduce the funds available for direct and tangible conservation actions.

Background

Bull trout (*Salvelinus confluentus*) are members of the char subgroup of the family Salmonidae and are native to waters of western North America. Bull trout range throughout the Columbia River and Snake River basins, extending east to headwater streams in Montana and Idaho, into Canada, and in the Klamath River basin of south-central Oregon. The distribution of populations, however, is scattered and patchy (Goetz 1989; Rieman and McIntyre 1993; Zeller 1992; Light *et al.* 1996; Quigley and Arbelbide 1997).

Bull trout exhibit a number of life-history strategies. Stream-resident bull trout complete their entire life cycle in the tributary streams where they spawn and rear. Most bull trout are migratory, spawning in tributary streams where juvenile fish usually rear from 1 to 4 years before migrating to either a larger river (fluvial) or lake (adfluvial) where they spend their adult life, returning to the tributary stream to spawn (Fraley and Shepard 1989). Resident and migratory forms may be found together, and either form can produce resident or migratory offspring (Rieman and McIntyre 1993).

Bull trout, coastal cutthroat trout (*Oncorhynchus clarki clarki*), Pacific salmon (*Oncorhynchus* spp.), and some other species are commonly referred to as ''anadromous'' (fish that can migrate from saltwater to freshwater to reproduce). However, bull trout, coastal cutthroat trout, and some other species that enter the marine environment are more properly termed ''amphidromous.'' Unlike strictly anadromous species, such as Pacific salmon, amphidromous species often return seasonally to fresh water as subadults, sometimes for several years, before returning to spawn (Wilson 1997). The amphidromous life history form of bull trout is unique to the Coastal-Puget Sound population. For additional information on the biology of this life form, see our June 25, 2004, proposed critical habitat designation for the Jarbidge River, Coastal-Puget sound, and Saint Mary-Belly River populations of bull trout (69 FR 35767).

For additional information on population ranges, biology, and habitat requirements of the bull trout, please refer to the following published rules: Proposed critical habitat designation for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River populations (69 FR 35767, June 25, 2004; as corrected by 69 FR 43058, July 19, 2004); final critical habitat designation (69 FR 59995, October 6, 2004) and proposed critical habitat designation (67 FR 71235, November 29, 2002) for the Klamath River and Columbia River populations; and listing rules for the Klamath River and Columbia River populations (63 FR 31647, June 10, 1998), Jarbidge River population (64 FR 17110, April 8, 1999), and for all populations (64 FR 58909, November 1, 1999).

Previous Federal Action

Please refer to the November 29, 2002, proposed critical habitat designation for the Klamath River and Columbia River bull trout populations (67 FR 71235) for a detailed summary of Federal actions completed prior to publication of that proposal related to all bull trout populations. Please refer to the October 6, 2004, final critical habitat designation for the Klamath River and Columbia River bull trout populations (69 FR 59995) for a detailed summary of Federal actions completed between the proposed and final rules related to the Columbia and Klamath populations. Please refer to the June 25, 2004, proposed critical habitat designation for the Jarbidge, Coastal-Puget, and St. Mary Belly bull trout populations (69 FR 35767) for a detailed summary of previous Federal actions completed prior to publication of that proposal related to those bull trout populations.

On December 14, 2004, Alliance for the Wild Rockies *et al.* filed a complaint challenging the adequacy of the final critical habitat designation for the Klamath River and Columbia River bull trout populations. Our motion for partial voluntary remand was subsequently granted by the court with a final rule due by September 15, 2005. On May 25, 2005, we announced the opening of a public comment period on the proposed and final designations of critical habitat for the Klamath River and Columbia River bull trout populations (70 FR 29998). On June 6, 2005, we published a notice clarifying the reopening of the comment period for the proposed and final designation of critical habitat for the Klamath River and Columbia River bull trout populations (70 FR 32732). The comment period was open until June 24, 2005.

On May 3, 2005, we published a notice of the availability of the draft economic analysis (DEA) and reopening of a 30-day comment period until June 2, 2005 (70 FR 22835), for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-belly River populations of bull trout. On June 27, 2005, Judge Jones extended the deadline for designating critical habitat for the Puget Sound-Coastal, Jarbidge, and St. Mary-Belly River bull trout populations to September 15, 2005. This rule combines all of the listed populations of bull trout into one final critical habitat designation, and, in doing so, replaces the final critical habitat designation for the Klamath River and Columbia River populations of bull trout published in the **Federal Register** on October 6, 2004 (69 FR 59995).

Summary of Comments and Recommendations

Jarbidge River, Coastal-Puget Sound, and Saint Mary-belly River Bull Trout Populations

We requested written comments from the public on the proposed designation of critical habitat for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-belly River populations of bull trout in the proposed rule published on June 25, 2004 (69 FR 35767). We also contacted and invited the appropriate Federal, State, and local agencies, scientific organizations, and other interested parties to comment on the proposed rule. In addition, we held one public hearing on August 10, 2004, in Tumwater, Washington.

During the comment period that opened on June 25, 2004, and closed on August 24, 2004, we received 34 comment letters directly addressing the proposed critical habitat designation: 8 from peer reviewers, 5 from Federal agencies, 3 from State agencies, 2 from County or city agencies, 6 from tribes, and 10 from organizations or individuals.

During the reopened comment period (May 3, 2005 through June 2, 2005) (70 FR 228350), we received 16 comment letters directly addressing the proposed critical habitat designation and DEA, 7 of which were from organizations or individuals that submitted comments during the first comment period. Of the 16 letters, we received 1 from a peer reviewer, 2 from Federal agencies, 3 from State agencies, 3 from county or city agencies, 1 from a tribe, and 6 from organizations or individuals.

Klamath River and Columbia River Bull Trout Populations

Responses to public and peer review comments on proposed critical habitat for the Klamath River and Columbia River bull trout populations (67 FR 71235, November 29, 2002) and the DEA (69 FR 17634, April 5, 2004) were published in the final designation of critical habitat (69 FR 59995, October 6, 2004). The following summary responds only to those comments received during the reopened comment period period (May 3, 2005 through June 2, 2005) on the proposed and final rules for critical habitat designation for the Klamath River and Columbia River bull trout populations (70 FR 32732).

During the reopened comment period, we received 33 letters addressing the final critical habitat designation and economic analysis (EA). Of these letters, we received 7 from Federal agencies, 4 from State agencies, 10 from local entities, 1 from a tribe, and 11 from organizations or individuals.

All comments of a similar nature were grouped together for all populations of bull trout and are addressed in the following summary. Substantive comments have been incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicit opinions from individuals who have expertise with the species and the geographic region where the species occurs and are familiar with conservation biology principles. The peer review process for the Klamath and Columbia River bull trout populations was discussed in the October 6, 2004, final critical habitat designation for the Klamath River and Columbia River bull trout populations (69 FR 59995).

For the proposed critical habitat designation for Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations, we solicited independent expert review from eight individuals and all responded. The peer reviewers generally concurred with our methods, but also provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Key elements of the reviewers' critical comments related to the proposal's scope and whether existing laws and regulations already protect some areas. Comments also addressed the need for greater prioritization of conservation issues influencing critical habitat designation, emphasis on quality habitat to support the migratory life form of bull trout, and an explanation of why some particular habitat, including areas of degraded habitat, are important to bull trout conservation. Additionally, the reviewers provided many technical comments on the appropriateness and bounds of specific geographic areas proposed as critical habitat. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments for Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River Bull Trout Populations

When similar comments were also received from other reviewers, they are addressed in the comments here to avoid redundancy.

(1) *Comment:* A peer reviewer requested clarification on the difference between critical habitat subunits (CHSUs) and core areas described in the bull trout draft recovery plans (draft Recovery Plans) (Service 2002, 2004).

Our Response: In general, critical habitat subunits (CHSUs) correspond to core areas identified in the draft Recovery Plans (*http://www.fws.gov/pacific/bulltrout/*). However, the Olympic Peninsula and Puget Sound Critical Habitat Units (Coastal-Puget Sound populations) also contain nearshore and freshwater habitats outside of natal river basins that are used by bull trout from more than one CHSU or core area. These habitats outside of core areas contain all the physical elements and features (primary constituent elements) critical to overwintering, migration, and subadult and adult foraging needs essential for the conservation of amphidromous (referring to the migratory behavior of fishes moving from fresh water to the sea and vice versa, not for breeding purposes but occurring regularly at some stage of the life cycle, such as feeding or overwintering) bull trout, which are unique to the Coastal-Puget Sound bull trout population. Within the core areas, certain areas identified by the Service as containing features essential for the conservation of the species, and in need of special management or protection, are designated critical habitat. Although core areas contribute to recovery and share primary constituent elements (PCEs) with critical habitat, only those portions of the core areas that meet the statutory definition of critical habitat and provide defined PCEs are considered for designation.

(2) *Comment:* Since little of the Belly River is within the United States, this core area is not a biologically functioning unit that contains necessary features or PCEs.

Our Response: A short reach of the North Fork Belly River, extending across the international border from Canada (downstream) into the United States (upstream), is the only known spawning reach for bull trout in the entire Belly River system. Thus, this portion of the North Fork Belly River in the United States is vital as spawning and rearing habitat for this bull trout population. It contains the PCEs necessary for the spawning and rearing life stages (*i.e.*, permanently flowing, cold, upwelling groundwater with suitable spawning substrate and complex rearing habitat). The foraging, migration, and overwintering (FMO) habitat for this population is found downstream in Alberta, Canada. This downstream habitat includes the PCEs found in a migratory corridor, including deep holding pools and a forage base to support large adult bull trout. Adult fish from Canada travel into the United States portions of the watershed annually to spawn. Because of the important spawning areas in the United States, and the presence of necessary PCEs, we have determined that this area is essential to this important biologically functioning unit and is designated critical habitat.

(3) *Comment:* Although it may be consistent with section 4(b)(2) of the Act to exclude Habitat Conservation Plans (HCPs) and the areas covered by the Washington Forest Practice Rules, there are no provisions in the rule to include these excluded lands within designated critical habitat if land-use practices or ownership changes.

Our Response: Although the specific provisions vary for each plan, HCPs typically include language that addresses change in circumstances or ownership. For example the draft Implementing Agreement for the Washington Department of Natural Resources, Forest Practices HCP states that any changes in the permits must be adopted through the procedures specified in the Act, other applicable Federal laws, and applicable regulations and if the Service determines that such changes materially impair the conservation plan contained in the HCP, they will notify the State and, if the matter is not otherwise resolved, may suspend or terminate the HCP, permits and the Implementing Agreement. If land ownership changes and a new landowner does not agree to the terms and conditions of the original permit, the original permittee must work with the Services to determine whether, and under what circumstances, the permit can be terminated. In order to terminate a permit, the Services must determine if the minimization and mitigation

measures that were conducted up to that point were commensurate with the amount of incidental take that occurred during the term of the permit. The Services will always require implementation of any outstanding minimization and mitigation measures before a permit is terminated.

(4) *Comment:* Freshwater foraging, migratory, and overwintering habitats outside core areas are not clearly essential to bull trout nor well documented. Therefore, these areas should not be included in the critical habitat designation.

Our Response: Some habitats outside of core areas contain all the physical elements to meet critical overwintering, migration, and subadult and adult foraging needs that are essential for the conservation of amphidromous bull trout. Recent tagging studies on the Olympic Peninsula and in Puget Sound have tracked the complex migrations of amphidromous bull trout from their core areas to marine and freshwater foraging, migratory, and overwintering habitats outside of their natal core areas (Brenkman and Corbett 2003, 2005; Goetz *et al.* 2004). Amphidromous bull trout have shown site fidelity to, and extensive use of, freshwater and marine habitat areas, demonstrating these are necessary in completing their life history and therefore, are included as critical habitat.

(5) *Comment:* Reviewers acknowledged the exclusions the Service had proposed for HCPs and the Washington Forest Practice Rules and recommended considering other types of management plans and actions for possible exclusions. They indicated that designation of critical habitat would be a duplication of effort since Federal actions, such as allotment management plans, already undergo formal consultation. One reviewer wanted to know why waterbodies within some Federal lands, such as wilderness, parks, and forests, were not excluded. Another reviewer asked why multi-species conservation plans under development by local watershed organizations in Washington were not excluded. Several reviewers suggested lands covered by Washington State's watershed planning process (subbasin plans), and lands in Olympic and North Cascades National Parks are currently not in need of special management.

Our Response: We believe some existing management plans are appropriate for exclusion because the benefits of exclusion outweigh the benefits of inclusion (see section ''Section 3(5)(A) and Exclusions Under Section 4(b)(2)''). Landownership is not a factor in determining which areas contain PCEs and meet the definition of critical habitat. Some waterbodies on Federal lands meet the definition of critical habitat. While we have done so in the past, in this rulemaking we did not consider any pending HCPs for exclusion, primarily because none of the pending HCPs were at a point we could do so without prejudging the outcome of the ongoing HCP process and because we expect further changes to the developing HCPs.

(6) *Comment:* One reviewer suggested that Corps of Engineers 401 and 404 permits should be excluded from critical habitat.

Our Response: Corps of Engineers 401 and 404 or other instream permits are issued to ensure that applicants avoid and minimize impacts to streams. Any mitigation that may be required by a permit is to avoid or minimize degradation and to mitigate for unavoidable impacts.

(7) *Comment:* Are small stream habitats in the Saint Mary-Belly River headwaters in the critical habitat designation contributing to rearing and foraging of bull trout and are they adequately considered?

Our Response: Because of the steep topography, flashy stream flow and very active erosion and depositional processes of the Saint Mary-Belly River headwaters, very few smaller tributary streams support adequate year-round stream flow to allow bull trout passage; in addition, many have natural barriers. Most of those tributary streams have been surveyed, and all those known to support bull trout were considered and included in the final critical habitat designation.

(8) *Comment:* It would help to understand what the threats to bull trout are and how threats relate to critical habitat designation.

Our Response: For details of the threats that were the basis for the bull trout listing, refer to the final listing rules for the Klamath River and Columbia River population (63 FR 31647), Jarbidge River population (64 FR 17110), and Coastal-Puget Sound and Saint Mary-Belly River populations (64 FR 58910). Critical habitat identifies those areas that contain the physical and biological features (PCEs) that are essential to the conservation of the species, and those areas that may require special management considerations or protections.

Public Comments Related to Bull Trout Biology and Habitat; Process of Designating Critical Habitat for the Bull Trout

(9) *Comment:* The proposed critical habitat for the bull trout fails to account for the importance of habitat connectivity.

Our Response: The draft Recovery Plans, critical habitat proposal, and the listing rules for bull trout, citing relevant scientific literature, describe the species' conservation needs. In fact, migratory corridors with minimal physical, biological, or water quality impediments are identified as a PCE in the critical habitat rule. Our proposed designation connected essential occupied waterbodies having PCEs to one another to maintain connectivity within and among habitat types (spawning and rearing, freshwater and marine foraging, migratory, and overwintering habitats). In the final designation, we exclude some critical habitat segments based on a careful balancing of the benefits of inclusion versus the benefits of exclusion. Exclusion of waterbodies from designated critical habitat does not negate or diminish their importance for bull trout conservation, and in most cases does not affect the protections available to that habitat through the Act.

(10) *Comment:* The status of bull trout strongly indicates that critical habitat designation is warranted for all waterbodies occupied by bull trout.

Our Response: Although all occupied habitats are important to the species, not all meet the definition of critical habitat. Examples of exclusions include reaches where bull trout are sometimes entrained and lost to the population or highly fragmented habitats within core areas. We believe that we have identified habitat that contains features essential to the bull trout's conservation. In the final designation, we exclude some critical habitat segments based on a careful balancing of the benefits of inclusion versus the benefits of exclusion. Exclusion of waterbodies from designated critical habitat does not negate or diminish their importance for bull trout conservation.

(11) *Comment:* The Service should describe the relationship between the reduced distribution of salmon and steelhead (*Oncorhynchus* sp.) and the reduced distribution and abundance of bull trout.

Our Response: Our recovery plan and administrative record for critical habitat designation, including public comment and peer review, includes information about the relationship between bull trout and their prey species, such as salmon and steelhead. Such information was employed to support the biological basis of the proposal, but practical considerations limited the amount of such information that could be presented in the proposed critical habitat rule. Refer to the previously

published bull trout critical habitat designations and listings (63 FR 31647, 64 FR 17109, 64 FR 58910, 68 FR 6863, 69 FR 35767, 69 FR 59995) for additional information.

(12) *Comment:* The Service's position equating adverse modification with jeopardy is not supported by the Act or case law. The Service needs to define adverse modification.

Our Response: In response to recent court decisions, we are no longer using the regulatory definition of adverse modification. Instead, we are following guidance from the Director, embodied in a December 9, 2004 memorandum, which uses the statute as the basis for our regulatory standard when conducting section 7 consultations on critical habitat. We do note in this rule that due to the method of analyzing jeopardy specific to bull trout, that jeopardy and adverse modification rarely diverge. However, that circumstance is due to the specifics of our bull trout analyses rather than an interpretation of regulations or law.

(13) *Comment:* The Service proposed to designate streams as critical habitat that do not currently support bull trout or have little evidence of bull trout use, with no justification for such designation as to why these stream reaches are essential to the conservation of the species, as required by the Act.

Our Response: All streams proposed for critical habitat designation within the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout population segments were known to be occupied. We considered streams occupied if bull trout were documented there within the last 20 years (our 2004 critical habitat designation provides a full explanation for the basis of this standard). Areas of unknown occupancy and unoccupied habitats were included in the proposed designation for the Klamath River and Columbia River populations. However, in this final rule no unoccupied habitat is being designated. The bull trout critical habitat designation is based on the best available scientific information. In addition, the proposed designations were peer-reviewed by individuals who have expertise with bull trout, the geographic region where bull trout occur, and the principles of conservation biology. Justifications for all critical habitat units are available for public review (see **ADDRESSES** section above).

(14) *Comment:* Critical habitat needs to be designated in unoccupied areas because these areas are important for re-introduction of extirpated populations or expansion of existing populations and are the most important areas in need of protection.

Our Response: We have limited the critical habitat designation to areas of known occupancy that have features essential to the conservation of the species because we did not have sufficient data for the Secretary to make a determination that specific unoccupied areas were essential to the bull trout's conservation. We based this designation on the best scientific and commercial information available. Many streams not included in this designation can and will contribute to bull trout recovery, but do not meet the definition of critical habitat.

(15) *Comment:* The Service neglected or violated a variety of regulatory or other requirements including NEPA, the Data Quality Act, Regulatory Flexibility Act, and other laws, regulations, and orders.

Our Response: We are not required to prepare an environmental assessment or an environmental impact statement, as defined under the authority of NEPA, in connection with regulations adopted pursuant to section 4(a) of the Act, and in States under the jurisdiction of the Ninth Circuit Court. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). This position has been upheld by the Ninth Circuit Court of Appeals in *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995). We have addressed all the relevant required regulatory determinations in this rule (see Required Determinations section below). Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific and commercial data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. All information in this critical habitat rule is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service. Both public and peer review of the proposed rule further ensures that the final designation will meet this standard.

(16) *Comment:* Stream temperature is a limiting factor for some populations, and bankfull designation may not encompass sufficient shading to maintain water temperatures for bull trout.

Our Response: We agree that temperature can be a limiting factor for some populations which is why it is considered a PCE. Riparian vegetation influences instream habitat conditions by providing shade, organic matter, root strength, bank stability, and large woody debris inputs to streams. Stream width and depth ratios also influence stream temperatures. Even though riparian vegetation may not be within a stream's bankfull width, and therefore not included in the critical habitat designation, effects to these areas are likely to be evaluated during the consultation process due to the indirect effect riparian and upland actions may have on water temperatures, which is one of the identified PCEs for bull trout critical habitat.

(17) *Comment:* The Service failed to consult with Native American tribes in developing the proposed rule and economic analysis.

Our Response: We have been, and will continue, to consult with those tribes affected by the critical habitat designation. We contacted Native American tribes where proposed bull trout critical habitat occurred on, or adjacent to, tribal lands. We discussed the critical habitat proposal with representatives of the tribes that responded. We will continue to work with the tribes on a government-to-government basis for the conservation of bull trout.

(18) *Comment:* A single sighting of a native char (bull trout) in a water body is not sufficient reason to designate the water as critical habitat.

Our Response: We have not designated any unoccupied areas as critical habitat. However, we included any area with documented occupancy (even a single sighting) within the last 20 years, if the area has PCEs essential to the species' conservation and will support the essential life history needs of bull trout. The published survey protocol for juvenile and resident bull trout was not developed until 2002, and no similar survey protocol for adult migratory bull trout has been developed. Many bull trout sightings are the incidental result of surveys for other species (salmon). In addition, bull trout are difficult to find, are migratory, and often exhibit a patchy distribution. Therefore, an incidental sighting of one

individual or a few bull trout is often the only available information until a targeted survey for bull trout is conducted. With the increasing availability of radio telemetry data, we are finding that the extent or range of bull trout occupied habitat is often greater than was previously known based on incidental observations.

(19) *Comment:* Specific numerical habitat standards for critical habitat must be included along with critical habitat designations.

Our Response: There is no requirement under the Act that PCEs have specific numerical standards, nor would it necessarily promote effective conservation to determine numerical standards for all PCEs given the various life histories expressed by bull trout throughout their range. However, we recognize the value of observable or measurable standards. The PCEs include numerical standards when appropriate (*e.g.*, to bracket a range of acceptable temperatures) and feasible, such as for temperature and substrate embeddedness.

(20) *Comment:* The Service should designate critical habitat for a number of ''source water'' streams. These are predominantly steep, small streams not occupied by bull trout, but are key sources of cold, clean water that feed bull trout habitat downstream.

Our Response: Streams that contribute necessary habitat elements such as cold, clean water downstream to designated streams are not included in this designation unless bull trout presence has been documented. Our determination of bull trout critical habitat is limited to areas that bull trout rely on for some portion of their life cycle. Although not designated as critical habitat, we recognize that these ''source waters'' or non-fish-bearing streams influence the character of designated stream segments located downstream. Where section 7 consultation is required, impacts to these ''source water'' streams that may affect bull trout critical habitat will be evaluated (see Critical Habitat Designation section below).

(21) *Comment:* The Service failed to include areas of historical bull trout occupancy and the rules do not provide adequate justification for their exclusion.

Our Response: The critical habitat proposals did not reflect all habitat areas bull trout are known to occupy or occupied historically, in the coterminous United States. Rather, it reflects those areas that contain the necessary features that are essential for the conservation of the species and are currently occupied by the species. Historical records of bull trout distribution may be anecdotal and incomplete relative to current bull trout distribution and thus, would not provide a sufficient basis for this critical habitat rule. We believe by defining as occupied those segments with at least one documented sighting in the last 20 years we have used a sufficiently broad measure to ensure the most likely occupied areas are included. This standard takes into account the fact that bull trout are abnormally difficult to find as they are primarily nocturnal feeders.

In our proposed critical habitat designation for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River population segments, we specifically solicited additional information on areas of habitat with evidence of occupancy of which we were unaware. These waterbodies had been identified by the bull trout recovery teams as key recovery habitat in the draft recovery plan, however, at that time they had no specific information documenting bull trout occupancy. Since the proposal, we have received additional information on bull trout occupancy for several tributaries in the Nooksack River (Fossil Creek), South Fork Skykomish River (West Fork Foss River), and Ross Lake (North Fork Canyon Creek) systems, which have been excluded from the final designation (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(22) *Comment:* The contribution of tribal lands to bull trout habitat conservation is unclear and these lands are not essential to bull trout recovery.

Our Response: The scientific information cited in the draft Recovery Plans provided the basis for our evaluation of habitats that contain the features essential to bull trout conservation. Many tribal lands include portions of mainstem rivers that provide essential migratory corridors and overwintering habitat for fluvial and amphidromous bull trout. Waterbodies on tribal lands were included in the critical habitat designation only if they were found to be currently occupied, contain PCEs that are essential for bull trout conservation, and were not adequately covered by management plans (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(23) *Comment:* The proposed rule fails to mention water rights.

Our Response: The proposed and final rules do not specifically address water rights. However, examples of activities that may potentially affect aquatic bull trout critical habitat by altering the PCEs, such as changes in water use or water rights were provided in the proposed and final rules.

(24) *Comment:* The proposal to designate critical habitat in the Saint Mary-Belly Rivers focuses on potential impacts of irrigation activities instead of potential adverse effects of recreational fishing on bull trout.

Our Response: Under the 4(d) rule that was included in the final rule which listed bull trout, take of bull trout in accordance with state, National Park Service, and Native American Tribal permitted fishing activities is allowed (64 FR 58910). Irrigation activities are often linked to Federal agencies, such as Bureau of Reclamation (BOR), for the allocation, delivery or storage of the water. Individual anglers, however, are only required to avoid take of listed bull trout by following fishing regulations.

(25) *Comment:* There is no evidence to specifically identify when marine or estuarine areas are being used by bull trout.

Our Response: Recent radio and acoustic telemetry studies in Grays Harbor, Puget Sound, and the Snohomish, Dungeness, and Hoh Rivers have provided new information on bull trout use of marine and estuarine areas and the importance of this habitat for bull trout recovery (Brenkman and Corbett 2003, 2005; Jeanes *et al.* 2003; Goetz *et al.* 2004). These studies documented that marine forage fish such as herring (*Clupea* spp.), surf smelt (*Hypomesus pretiosus*), sand lance (*Ammodytes hexapterus*), and shiner surfperch (*Cymatogaster aggregate*) are bull trout prey. In addition, marine waters provide essential migratory corridors for amphidromous bull trout moving from their natal river basin to other rivers or streams as they seek suitable foraging or overwintering habitat. We now know that large numbers of bull trout overwinter in streams that do not contain spawning and rearing habitat and are only accessible by migration through marine waters. Therefore, we have included these marine nearshore areas that contain features essential to bull trout conservation in this final designation.

(26) *Comment:* Adequate foraging habitat has not been included in the designation.

Our Response: We believe this designation is based on the best scientific and commercial information available. It includes only occupied habitat, and contains those features that are essential to the conservation of bull trout populations. We recognize that bull trout may forage in areas where their presence has not been detected and these areas may provide access to

abundant forage. However, because we were unable to identify all areas that are used, we have limited designated critical habitat to areas of known occupancy having the necessary PCEs and which were determined to be essential for recovery. However, because of the relatively broad definition of 'occupied' used in this rule, it is likely that forage habitat is included as well as breeding habitat and migratory corridors.

(27) *Comment:* Floodplains are not mentioned in the proposed designation. Does this mean they are not included?

Our Response: We have only included occupied aquatic habitats that contain the features essential to the conservation of bull trout within the designation. Federal activities occurring in floodplains may affect designated critical habitat, and as such would be reviewed in section 7 consultation.

(28) *Comment:* Comments provided in the previous rule for the Klamath River and Columbia River populations were not addressed.

Our Response: All substantive issues raised in comments received during public comment period for the proposed rule received a response. The response was to either accept or incorporate the issue raised, or to provide a narrative response as to why we did not do so.

(29) *Comment:* Existing regulatory mechanisms are inadequate and continuing threats to bull trout and its habitat from a variety of land and water management activities warrant the designation of all habitat essential to bull trout survival and recovery.

Our Response: We believe this designation is based on the best scientific and commercial information available, includes only occupied habitat, and contains those areas that contain the features essential to the conservation of bull trout. Some areas we identified as essential to the conservation of bull trout are not designated in the final rule. This is due to the areas not meeting the definition of critical habitat under section 3(5)(A) or exclusion under 4(b)(2). Sections 3(5)(A) (definition of critical habitat) and 4(b)(2) (Secretarial weighing of the benefits of inclusion versus the benefits of exclusion) of the Act provide for specifc areas to be excluded from critical habitat if they are otherwise provided needed protection (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(30) *Comment:* The final rule is inadequate to recover bull trout and the status quo is leading to declining populations in spite of section 7 consultations, habitat conservation plans, and state restoration plans.

Our Response: Recovery planning for bull trout is complex due, in part, to its wide geographic distribution and multifaceted life history. Recovery of the species will require a variety of efforts and the cooperation of Federal, state, tribal, and other entities. Critical habitat by itself will not recover the species, but does provide an additional regulatory benefit for bull trout habitat where protection and special management are necessary to ensure the habitat contributes to the conservation of the species. While any one effort will not recover bull trout, we believe that through the cooperative efforts of all stakeholders, using a variety of conservation tools, bull trout can reach the point of no longer needing the protections of the Act.

(31) *Comment:* We believe that the current attempt to solicit more information on the critical habitat rule is unlawful.

Our Response: We disagree and believe that soliciting public comment is essential to conserving any species.

(32) *Comment:* Why is the entire Columbia River mainstem (especially the upper Columbia River) designated as critical habitat, what data were used, and why did the Service use the draft recovery plan?

Our Response: This final rule does not include the entire Columbia River mainstem. The bull trout is a wide ranging migratory species and follows salmon, whitefish, and other prey species in the Columbia River, marine waters and freshwater streams and rivers. Records of bull trout distribution indicate their presence from the mouth of the Columbia River to its uppermost reaches. Past monitoring efforts for salmon rarely recorded bull trout in data collections because bull trout were not the targeted species. In the upper Columbia River data from multiple telemetry studies show the use by bull trout of the area between Priest Rapids pool and the Okanogan River, and back into multiple tributaries. Some bull trout that spawn in the upper Columbia River basin use the mainstem for six months or more. We have excluded some areas of the Columbia mainstem where the benefits of excluding these areas outweigh the benefits of including them in the designation (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below). Sub-adults and adults that spawn in alternate years have been documented using the Columbia River year-round. In reference to the use of the draft recovery plan, the Service acknowledges there are data gaps within the plan. The science used in the draft recovery plan was the best available data for bull trout at that time and provided the basis for proposing and designating critical habitat. In the process of developing the proposed and final critical habitat designation, additional data have become available, have been used in these rules, and are available as part of our administrative record.

(33) *Comment:* All waters behind dams (reservoirs and pools) and areas covered by habitat conservation plans do not require designation due to existing management activities and should be excluded.

Our Response: We reviewed reservoir operations and habitat conservation plans and carefully weighed the benefits of inclusion versus the benefits of exclusion. Based on this analysis we are excluding all reservoirs and pools that provide flood protection or water supply benefit and we are also excluding habitat conservation plans that adequately address bull trout conservation (see Section 3(5)(a) and Exclusions under Section 4(b)(2) section below).

(34) *Comment:* The final rule for Klamath River and Columbia River populations needs clarification regarding the exclusion of 0.5 mile segments on private land. The inclusion of these stream segments appears to contradict the statement in the rule that exempts segments of less than 0.5 miles on private land.

Our Response: The intent in the previous rule was to exclude those stream segments that were less than 0.5 miles in length and under private landownership. The definition was intended to apply only to unbroken stream segments shorter than 0.5 miles in length, irrespective of underlying landownership patterns. The Service is no longer excluding areas of critical habitat on this basis, and all stream segments regardless of length remain designated critical habitat.

Exclusion Comments

(35) *Comment:*Exclusions are arbitrary and benefit special interest groups.

Our Response: All areas excluded are covered by management plans that specifically address bull trout PCEs, or are being excluded based on policy considerations. Exclusions were carefully reviewed and the Secretary has made the determination that the benefits of excluding these habitats outweighs the benefits of including them in the designation (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(36) *Comment:* Comments were received to either exclude or to include areas covered by HCPs.

Our Response: We determined that waterbodies within lands covered under an existing or pending HCP should be excluded from the designation of critical habitat where the benefits of excluding these habitats covered by these management plans outweighs the benefits of including them in the designation (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(37) *Comment:* Comments were received to either exclude or to include areas covered by the Washington Forest Practice Rules. Reasons cited for including areas covered by the Washington Forest Practice Rules were that the rules are not complete, the rules do not include adequate standards, it has not been fully implemented, and the adaptive management process is incomplete. A primary reason expressed for excluding those lands was that this law protects aquatic habitat on State and private land.

Our Response: Washington State law H.B. 2091, which codified the Washington Forest Practice Rules, is a science-based plan that protects water quality and fish habitat on over 8 million acres (3.2 million ha) of non-Federal forestland throughout Washington State. Implementing these regulations is expected to maintain the thermal regimes of streams within the range of normal variation, contribute to the maintenance of complex stream channels, maintain appropriate substrates, natural hydrograph, ground-water sources and subsurface connectivity, migratory corridors, and provide abundant food sources for bull trout. Because the benefits of excluding the streams covered by the Washington Forest Practice Rules outweigh the benefits of including them, we have excluded stream segments protected by these regulations. See Washington State Forest Practices Rules and Regulations, as amended by the Forest and Fish Law (FFR) under the Lands to be Excluded from Critical Habitat under section 4(b)(2) of this final rule for further discussion on FFR.

(38) *Comment:* We believe the current Forest Service Land and Resource Management Plans (LRMP) as amended by the Northwest Forest Plan, PACFISH, and/or INFISH aquatic conservation strategies provide the necessary protection and special management that would eliminate the need to designate these areas as critical habitat. In addition, the designation would provide little additional benefit as described under Section 4(b)(2) of the Act.

Our Response: We agree. These areas have been excluded from the final critical habitat designation (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(39) *Comment:* Areas covered by the Oregon Forest Practices Act (OFPA) and the Oregon Plan for Salmon and Watersheds (OR Plan) should be excluded.

Our Response: The OFPA includes provisions that generally limit clear cut size, require retention of green trees within harvest units for stream shading and downed wood for recruitment into riparian areas, and require replanting after harvest. However, the OFPA has no provisions that specifically address any of the PCEs for bull trout or for ensuring their conservation or protection. The OR Plan serves as a general salmon conservation planning guide and encourages close coordination among the agencies responsible for salmon conservation. Both the OFPA and OR Plan are well intentioned and provide encouragements and some benefits to aquatic habitats in areas where they apply. However, we were unable to determine that the OFPA or the OR Plan provide adequate conservation or protection of bull trout or their PCEs. Therefore, the areas covered by the OFPA or OR Plan do not warrant exclusion based on special protections or management.

(40) *Comment:* The Montana Bull Trout Plan should not be used as the basis for excluding lands from critical habitat. It is a voluntary plan without tracking, reporting, or funding certainty, and it provides no protections against detrimental groundwater or surface water extraction. Implementation has been slow or nonexistent, the list of recommended immediate conservation actions were not acted upon or incorporated into the Plan.

Our Response: We have reviewed the plan and determined it does not provide special management protections to the same extent a critical habitat designation would. Therefore, we are not using the Montana Bull Trout Plan as a basis for excluding lands from critical habitat.

(41) *Comment:* No critical habitat should be designated on military lands for national security concerns or those that have Integrated Natural Resource Plans.

Our Response: Pursuant to section 4(a)(3)(B)(i) of the Act, the Service has not included critical habitat on military installations that have an Integrated Natural Resource Plan (INRMP) that provide benefits to the bull trout. Pursuant to section 4(b)(2) of the Act, we have excluded other military lands based on national security concerns (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(42) *Comment:* Reservoirs should be included as critical habitat.

Our Response: In many places reservoirs provide important foraging and overwintering habitat for bull trout and contain the features essential to the conservation of the bull trout. However, under 4(b)(2) of the Act, the Secretary has discretion to exclude any area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The Secretary carefully weighed the benefits of inclusion versus the benefits of exclusion regarding reservoirs (see Section 3(5)(A) and Exclusions under Section 4(b)(2) section below) and found that, for those reservoirs that provide a flood control or water for human consumption function, the benefits of exclusion outweighed the benefits of inclusion.

(43) *Comment:* All tribal reservation lands should be excluded from critical habitat designation.

Our Response: In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and 512 DM 2, we coordinate with federally-recognized tribes on a government-to-government basis. Further, Secretarial Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (1997) provides that critical habitat should not be designated in an area that may impact tribal trust resources unless it is determined to be essential to the conservation of a listed species and that Tribes be given deference when evaluating conservation management planning.

Accordingly, we are obligated to consult with tribes based on their unique relationship with the Federal government, and to evaluate the appropriateness of designating tribal lands within the framework of the above mentioned directives. In addition, we evaluate tribes' past and ongoing efforts for species conservation and the benefits of including or excluding tribal lands in the designation under section 4(b)(2). We contacted all tribes potentially affected by the proposed designations and met with a number of these tribes to discuss their ongoing or future management strategies for bull trout. Several tribes subsequently submitted letters requesting exclusions from the designation based on their ongoing

management and conservation efforts, or their commitment to develop an appropriate management plan, on their lands. We excluded those tribal lands where there was a commitment to conserve bull trout habitat and where the benefits of exclusion where found to outweigh the benefits of inclusion (*see* Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act section below).

(44) *Comment:* The Service ignores court decisions and required components of the Act when it states that areas can be excluded based on economic impacts, national security, management plans, and the preservation of partnerships (*see Center for Biological Diversity* v. *Norton* (2003)).

Our Response: Section 4(b)(2) of the Act allows us to consider the economic impact, national security impact, and any other relevant impact of designating any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of designating a particular area as critical habitat, unless the failure to designate such an area as critical habitat will result in the extinction of the species. In addition, the congressional record is clear that the consideration and weight given to any impact is completely within the Secretary's discretion (*see* Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(45) *Comment:* Does excluding habitat covered by HCPs also exclude covered activities on lands the applicant does not own or manage? For example, studies are occurring on lands not owned by the City of Seattle but required by the terms of the approved HCP.

Our Response: Areas excluded due to the existence of an approved HCP only include those areas directly covered by the HCP. Areas outside the HCP *e.g.*, City of Seattle, remain designated critical habitat unless excluded for some other reason.

Comments Related to the Economic Analysis

(46) *Comment:* The Service neglected to conduct an economic analysis (EA) for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations, contrary to the Act's requirements.

Our Response: The Service did conduct an economic analysis for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations. We informed the public in the proposed rule that we would be conducting an analysis of the economic impacts of designating the proposed areas as critical habitat prior to making a final determination. We announced the availability of the DEA with a notice in the **Federal Register** (May 3, 2005, 70 FR 22835) that reopened the public comment period on the DEA and the proposed rule at that time. Reopening the comment period allowed the public to concurrently review and comment on both the DEA and the proposed critical habitat designation. We subsequently provided this same information when replying to electronic mail (e-mail) messages and telephone calls, and during the public hearing held in Washington.

(47) *Comment:* The costs of critical habitat outweigh the benefits of designation and all costs associated with critical habitat should be included in the analysis.

Our Response: This final rule excludes areas where the benefits of excluding critical habitat have been determined to exceed the benefit of including these areas in the designation under provisions of section 4(b)(2). The economic analysis (EA) considers the economic efficiency effects that may result from the designation, including habitat protections that may be coextensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. The analysis focuses on quantifying the direct and indirect costs of the rule although economic impacts to land-use activities may exist in the absence of designating critical habitat. For example, economic impacts may result from local zoning laws, state and natural resource laws, and enforceable management plans and best management practices applied by other state and Federal agencies. The information in the EA can be used by the Secretary when taking into consideration the economic impact, and any other relevant impact of specifying any particular area as critical habitat.

(48) *Comment:* Costs associated with the operations of agencies such as the Bureau of Reclamation (BOR) to deliver water belonging to irrigation districts must be taken into consideration. The impact of attempting to alter pre-existing legal requirements, and the constraints those legal rights have on designating critical habitat, must be considered before a final decision can be made.

Our Response: Potential costs associated with the designation of bull trout critical habitat, including those related to BOR water management, are addressed through the economic analysis. We received additional information regarding the possible under-or over-estimate of costs related to regulation of water and power generation due to the designation. Where appropriate, this information was used by the Secretary in making determinations under section 4(b)(2) of the Act.

(49) *Comment:* In the economic analysis, the Service did not account for the many economic benefits that the designation of critical habitat for bull trout provides.

Our Response: In the context of a critical habitat designation, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is to designate areas that contain the features essential to the conservation of listed species and that may require special management or protections. While the Act is clear that it is the policy of the Federal government to provide a means whereby the ecosystems upon which endangered and threatened species depend are conserved, it is also clear that Congress provided several methods for achieving this policy and critical habitat designation is just one of the methods. The Act states that this policy is to be achieved through cooperation with states through the resolution of water resource issues in concert with conservation. Finally, the Act provides the flexibility for the Secretary to exclude portions of critical habitat based on the consideration of economics, national security, or any other relevant impact if the Secretary determines that the benefit of exclusion exceeds the benefits of inclusion, as long as that exclusion does not result in the extinction of the species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Measurable or economic benefits and (2) intangible benefits. The economic analysis generally captures the measurable benefits (such as increased tourism or recreational expenditures) by quantifying them in terms of dollars. The less tangible social benefits that accrue from the physical existence of a resource are more difficult to capture. Non-use benefits, in contrast, represent benefits that individuals perceive from ''just knowing'' that a particular listed species'' natural habitat is being specially managed for the survival and recovery of that species. This benefit is virtually impossible to quantify as there is no market transaction to use as a measurement for such a benefit.

The economic analysis captures those benefits that can be quantified and provides information regarding the economic costs associated with a proposed critical habitat designation.

The economic analysis is used by the Secretary in making decisions under section 4(b)(2) of the Act based on economic impacts. Economic impacts can be both positive and negative and, by definition, are observable through market transactions.

In our designations we recognize that critical habitat may also generate ancillary benefits which can be both negative and positive. That is, management actions undertaken to conserve a species or habitat as a result of designation may have coincident implications to a place's quality of living. For example, fewer consumptive activities (*e.g.*, timber harvesting or cattle grazing) may affect some individuals' enjoyment of an area. While they are not the primary purpose of critical habitat, these ancillary effects which are perceived as benefits may result in gains in non-economic benefits that may offset the direct, negative impacts to a region's economy resulting from actions to conserve a species or its habitat. Conversely, for those formerly dependent on the timber industry or grazing for their livelihood, they may find that significantly reduced employment opportunities which represent reduction in benefits.

It is often difficult to evaluate the ancillary benefits of a critical habitat designation. Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (*e.g.*, impacts that would be associated with an increase in tourism spending by wildlife viewers). Conversely, if the critical habitat designation will result in increased fishing and hiking opportunities, that benefit would be reflected in economic benefits from tourism and related industries. What is not measurable in other than qualitative terms are such benefits as increased quality-of-life values for some and decreased quality-of-life for others (*e.g.*, lower employment due to family wage jobs supported by industrial timber harvesting being replaced by service jobs in the recreation industry).

While section 4(b)(2) of the Act gives the Secretary discretion to exclude certain areas from the final designation, she is authorized to do so only if an exclusion does not result in the extinction of the species. Thus, we believe that explicit consideration of broader social values for the species and its habitat, beyond economic impacts, is evidenced by the designation itself that protects areas for the conservation of the species despite costs associated with that designation. In other words, the Secretary begins a designation based on an assumption that the benefit of designation outweighs the benefit of exclusion and only excludes where an explicit determination is made that the benefit of exclusion, in fact, does outweigh the benefit of inclusion.

(50) *Comment:* The DEA for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations must evaluate impacts of bull trout critical habitat designation on the tribes' trust resources to be consistent with trust responsibilities.

Our Response: The DEA for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations evaluates the impacts of this designation on tribal trust resources. Refer to section 3.1.4 in the DEA for further discussion on impacts of the bull trout critical habitat designation on the tribes' trust resources.

(51) *Comment:* The Service needs to address habitat and economic concerns in Canada, as well since a critical habitat designation may affect waters that flow into Canada.

Our Response: We state on page 35771 of the critical habitat proposed rule for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations that, ''The inter-jurisdictional nature of the Saint Mary River and Belly River watersheds is unique in the bull trout's range and makes international coordination especially critical.'' However, we cannot propose to establish critical habitat in other countries or address economic concerns of critical habitat in other countries.

(52) *Comment:* The BOR requires water users to pay for all maintenance and operational and mitigation costs associated with the Milk River irrigation system in Montana, so it is the irrigators not the BOR that must avoid adverse modification.

Our Response: Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that its actions do not destroy or adversely modify critical habitat. The Service consults with the Federal agencies (in this case BOR) not private individuals. Private individuals may, however, have an identified role in the consultation if they are ''applicants'' as defined in section 7.

(53) *Comment:* The BOR indicated that bypass facilities at the Saint Mary Diversion dam should be included among the costs attributable to bull trout (not included in the DEA), at an estimate of $128,000 (in 2002 dollars). In addition, there are costs associated with the Sherburne Dam rehabilitation, and BOR estimates those costs to be $700,000 (in 2004 dollars).

Our Response: The DEA acknowledged that elements of the Saint Mary Diversion fish entrainment and bypass costs and modifications to Sherburne Dam, located upriver of the Saint Mary Diversion, may be necessary. However, the specific elements or their costs for these components were not available at the time they were requested from BOR, and only preliminary estimates were provided in the DEA (see page 239). We have incorporated new information on these costs into the final economic analysis and our final critical habitat designation. Based on the costs provided in BOR's comment, updated to current dollars, the inclusion of bypass facility costs on the Saint Mary Diversion and the portion of Sherburne Dam rehabilitation attributable to bull trout would increase the total prospective costs by $830,900 and the total annualized cost by $78,400 in the Saint Mary-Belly River region.

(54) *Comment:* BOR noted that fish screens to reduce entrainment on the Saint Mary Diversion would likely not be installed were it not for the bull trout listing, and that the costs in the DEA were underestimated. BOR estimates the cost to be $4,270,000 for an 850 cubic feet/second (cfs) canal.

Our Response: BOR's project modification estimates for the rehabilitation of the Saint Mary Diversion were addressed in the DEA (page 239). However, specific costs for fish screens associated with the modification options were not available when we requested the information from BOR, and other sources of information were instead used in the DEA for estimating those costs. We appreciate receiving the estimate of cost that was provided in the comment. A decision has not yet been made about whether to proceed with the rehabilitation as planned, or when, or the size of the rehabilitated canal. Assuming that the rehabilitation is completed in 5 years, and based on the cost for fish screens provided by BOR

for an 850 cfs canal (updated to current dollars), the prospective cost attributable to bull trout would increase by $3,024,800 in the Saint Mary-Belly River region from that presented in the DEA. The total annualized cost would increase by $285,500.

(55) *Comment:* Monitoring riparian areas will occur in areas where there is no grazing. If grazing is unlikely to affect bull trout, why are costs involved?

Our Response: Monitoring livestock grazing that may affect the conservation status of sensitive species is a requirement of INFISH in eastern Oregon and Washington, Idaho, western Montana, and portions of Nevada. INFISH was developed as an amendment to U.S. Forest Service (USFS) land and resource management plans and Bureau of Land Management (BLM) resource management plans. The monitoring responsibility would be in effect even in the absence of the designation of critical habitat for bull trout. Costs were included in the economic analysis as they are related to the conservation of bull trout.

(56) *Comment:* The impacts in the economic analysis are overestimated because it does not differentiate between the impacts of the listing and impacts of critical habitat designation. This method of estimating costs unfairly attributes too large a percentage of costs to critical habitat.

Our Response: The economic analysis is intended to assist the Secretary in determining whether the benefits of excluding particular areas from the designation outweigh the biological benefits of including those areas in the designation. Also, this information allows us to comply with direction from the U.S. 10th Circuit Court of Appeals that ''co-extensive'' effects should be included in the economic analysis to inform decision-makers regarding which areas to designate as critical habitat (*New Mexico Cattle Growers Association* v. *U.S. Fish and Wildlife Service* (248 F.3d 1277)).

This analysis identifies those potential activities believed to be most likely to threaten the bull trout and its habitat and, where possible, quantifies the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat designation. Where critical habitat is being proposed after a species is listed, some future impacts may be unavoidable, regardless of the final designation and exclusions under section 4(b)(2). However, due to the difficulty in making a credible distinction between listing and critical habitat effects within critical habitat boundaries, this analysis considers all future conservation-related impacts to be co-extensive with the designation.

(57) *Comment:* The economic analysis overestimates impacts of critical habitat designation by not differentiating between impacts attributable to bull trout conservation verses salmon conservation.

Our Response: There are several salmonid species that are listed as threatened or are candidates for listing under the Act whose ranges overlap the critical habitat designation of bull trout. Conservation activities designed to protect bull trout may provide coincident protection to salmon. Conversely, conservation activities designed specifically for salmon may provide protection for bull trout. In assigning costs for fish-related conservation activities in watersheds supporting previously listed salmon species and bull trout, we assume in the analysis that the economic effect of fish-related conservation measures is attributed co-extensively to both species. Therefore, where a conservation activity provides indivisible benefits to both salmon and bull trout, the cost of the activity is apportioned to both species. In areas where proposed critical habitat for bull trout does not overlap the range of other listed species, the costs are assigned solely to bull trout conservation activities. Co-extensive effects may also include impacts associated with overlapping protective measures of other Federal, State, and local laws that aid habitat conservation in the areas proposed for designation. We note that in past instances, some of these measures have been precipitated by the listing of the species. Because habitat conservation efforts affording protection to a listed species likely contribute to the efficacy of the critical habitat designation efforts, the impacts of these actions are considered relevant for understanding the full effect of the proposed designation. Enforcement actions taken in response to violations of the Act, however, are not included.

(58) *Comment:* Critical habitat creates undue economic hardship on private land owners.

Our Response: Private landowners are only required to consult with the Service if their action has a Federal nexus and if the action is likely to affect bull trout or its critical habitat.

(59) *Comment:* By designating less area as critical habitat, the costs are disproportionately high for the areas included in critical habitat.

Our Response: Excluding areas does not increase the costs on those areas left within the designation. The costs associated with the designation are the section 7 administrative costs of preparing a biological assessment and the potential costs associated with implementing a Reasonable and Prudent Alternative (RPA) if we find that an action is likely to destroy or adversely modify critical habitat. Given that we are only designating critical habitat in occupied areas, where an action agency would need to consult on any adverse effects to bull trout, and given our framework for conducting section 7 consultations on bull trout and bull trout critical habitat, we anticipate that most projects that would result in destruction or adverse modification of critical habitat would also constitute jeopardy to the species. Thus, any costs associated with conducting consultations or implementing an RPA would be present with or without the critical habitat designation, and would not be correlated with the size of the designation.

(60) *Comment:* The EA does not address impacts/costs to the Klamath Lake BOR project or to Agency Lake Ranch.

Our Response: BOR staff were contacted and consulted on the likelihood of projects requiring section 7 consultation, as described in Section 4.2.4 for the final EA. When contacted, BOR staff in Klamath Falls stated that no significant consultation activity concerning bull trout was anticipated. As a result, the analysis assumes impacts are not reasonably foreseeable for a BOR project on Agency Lake Ranch.

(61) *Comment:* Specific cost information related to fencing, well installation, maintenance, grass filter strip installation was not accurate in the EA. The comment letter provided specific costs on a per acre basis.

Our Response: The DEA (Section 4.2.2, page 4–9 and Section 4.2.7, page 4–72) estimates the number of grazing-related consultations likely to take place in the future and then multiplies the consultations by per consultation estimates of fencing, monitoring, and water requirement costs. Whether the per acre costs presented in the comment fall within the range of per consultation costs estimated in the DEA is difficult to determine. The estimate in the DEA is drawn from a sample of historical consultations.

(62) *Comment:* The EA underestimated costs in the upper Deschutes River basin because 95 percent of crops depend on irrigation.

Our Response: The Upper Deschutes basin is currently unoccupied by the species. For effects to irrigated agriculture to occur, the Service would first have to reintroduce bull trout to this basin, consult with BOR on the

operation of the reservoir, and recommend reasonable and prudent measures that would reduce the available irrigation water. As discussed on page 4–28 of the report, this sequence of events is not reasonably foreseeable.

(63) *Comment:* Comments made on the DEA for the Columbia/Klamath Rivers populations were not incorporated into the final EA.

Our Response: We believe that the Final Economic Analysis adequately addresses all the comments provided during the public comment period that are consistent with the framework for the analysis described in Section 1.3 of the report. Specifically, impacts to families and small entities are addressed in Section 4.3; costs to irrigators, cities, industries, and other water users are addressed in Section 4.2; costs to hydropower customers are discussed in Section 4.4.2; potential costs to recreational users are discussed in Section 3.3.6; costs associated with flood damages are addressed in Section 4.2.4; costs associated with water quality changes are addressed in paragraphs 16 and 211; costs due to regulatory uncertainty are captured in Section 4; values of potential lost irrigation water supplies are discussed in paragraphs 494 through 499; and employment and secondary impacts are discussed in paragraph 274.

(64) *Comment:* The EA cited the existence of irrigated agricultural diversions and the need for fish screening of those diversions to prevent bull trout entrainment, however the EA did not extrapolate out screening costs. The EA acknowledged that fish screening costs are substantial, ranging between $2,000 and $5,000 per cfs the structure can divert.

Our Response: The Service agrees that irrigators incur costs associated with fish screens. However, as described in footnote 110 of the FEA, ''* * * installation of diversion fish screen[s] is a baseline regulation within Idaho, Oregon, and Washington. That is, screens on agricultural diversions are already required under Idaho Code 36–906(b).'' Because fish screens are required in Idaho, Oregon and Washington in the absence of the Endangered Species Act (ESA), these costs are not included in this analysis.

(65) *Comment:* The economic impact to Baker County and the Regulatory Flexibility Act was ignored in the DEA and final EA.

Our Response: In accordance with the Regulatory Flexibility Act, the Final Economic Analysis includes a quantitative screening analysis (see Section 4.3) that the Service used as the basis for its certification that a substantial number of small agricultural entities will not be significantly impacted by the proposed designation. Impacts to small farmers resulting from curtailed irrigation diversions are discussed specifically in Section 4.3.2.

(66) *Comment:* The costs for fish passage and habitat restoration are associated with compliance of Sections 4(e) and 18 of the FPA. The costs for fish passage and restoration of habitat address the recovery of other native salmonids found in the aquatic system, such as westslope cutthroat trout and mountain whitefish. The cost for total dissolved gas abatement is associated with compliance with the Clean Water Act under the 401 Water Quality Certification and Section 4(e) of the FPA. It is not clear what the final terms of the relicensing of the Box Canyon Project will be. The project modifications and costs are not due to bull trout Section 7 consultation as no biological opinion (BO) has been done. It is unclear why Box Canyon Project was picked for a discussion of detailed project modification costs since this project has no modification costs related to Section 7 consultation or the designation of critical habitat.

Our Response: FERC relicensing costs are discussed in Section 4.2.6 in the Final Economic Analysis (paragraphs 416–452). Estimates of project modification costs for the FERC Environmental Impact Statement (EIS) on Box Canyon are summarized in paragraph 452 as an example of the uncertainty surrounding the estimate of FERC-related costs. The discussion is consistent with this view that passage modifications are not attributable to section 7 bull trout consultations.

(67) *Comment:* The EA's estimate of conservation costs of $570 per acre for Dungeness Irrigation District is artificially low. The costs for revision or addition of fish passage facilities at those federal dams would be passed on to irrigation contractors through the United States Bureau of Reclamation.

Our Response: Following the framework described in on pages 1–11 and 1–12, the FEA considers the costs of proposed or reasonably foreseeable HCPs. In Section 4.1.2, the FEA identifies two HCPs that were currently under development at the writing of the analysis, and projects the costs of future based on the historical costs of developing these plans. HCPs are not reasonably foreseeable in the irrigation districts providing comment. However, the FEA accounts for HCP costs at unspecified locations for the 10-year time period of the analysis (see paragraph 359).

Unit Specific Comments

Unit 1: Klamath River Basin

(68) *Comment:* No critical habitat in Agency Lake was requested because of limited to no occurrences or use by bull trout.

Our Response: Historically, bull trout are known to have been distributed in several streams along the west side of Agency Lake (Cherry Creek, Threemile Creek, and Sevenmile Creek) and in the Wood River system (Sun, Annie, and Fort Creeks). Given the proximity of habitat and local populations and the predatory and migratory nature of the species, it is likely that bull trout utilized Agency Lake, at least seasonally, as feeding, migrating, and overwintering habitat, however, we are not able to document bull trout use in the last 20 years and have not included Agency Lake in this designation.

Unit 4: Willamette River Basin

See Comments from States (Oregon) section below.

Unit 6: Deschutes River Basin

(69) *Comment:* The Service properly chose not to designate the Crooked River as critical habitat because it is unoccupied and was not essential to the conservation of the species, that designation could also cause harm to ongoing conservation efforts, and that the benefits of excluding this area outweigh the benefits of including it.

Our Response: We have limited the critical habitat designation to areas of known occupancy (defined by documented occurrence within the last 20 years) that have features essential to the conservation of the species because we did not have sufficient data for the Secretary to make a determination that specific unoccupied areas were essential to the bull trout's conservation. We have determined that the approximately 14 mile-long section of the Crooked River downstream of the Highway 97 bridge to the Opal Springs Dam is occupied and contains many of the features essential to the conservation of the bull trout. The volume of cold water spring flows that enter the Crooked River downstream of the Highway 97 bridge crossing decreases stream temperatures enough to make this section of the Crooked River suitable for foraging bull trout even during the summer months. The additional habitat in the Crooked River also allows bull trout in Lake Billy Chinook to forage.

(70) *Comment:* There are many plans in the Deschutes River basin that provide special management and protections for bull trout (list of plans provided).

Our Response: The Service has reviewed information regarding numerous plans in the Deschutes River basin including the Middle Deschutes/Lower Crooked River Wild and Scenic Management Plan, the Lower Deschutes River Wild and Scenic River Management plans, the Aquatic Conservation Strategy of the Northwest Forest Plan, PACFISH, INFISH, and the Deschutes River Subbasin Plan. For each plan we assessed the protections of the plan as compared with the protections of critical habitat and weighed the benefits of inclusion versus the benefits of exclusion. For those plans where the benefits of exclusion outweighed the benefits of designating critical habitat we excluded those lands from the final designation (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

Unit 8: John Day River Basin

(71) *Comment:* Critical habitat should be removed on the mainstem John Day River below 4,500 ft elevation because the mainstem John Day River below this elevation does not have the appropriate water temperatures for bull trout.

Our Response: The Service acknowledges that the current distribution of bull trout in the John Day River basin is fragmented and that water temperature is a limiting factor in the lower portion of the river outside of peak runoff periods (late winter and spring). Bull trout distribution occurs primarily in the headwaters of the Upper Mainstem, North Fork and Middle Fork John Day River tributaries, with seasonal use of the entire North Fork John Day River. However, in 2000, the Oregon Department of Fish and Wildlife captured eleven subadult bull trout in the mainstem John Day River near the town of Spray, Oregon (1,802 ft elevation), while seining for juvenile Chinook salmon. Two of the fish were implanted with radio-tags and both were subsequently tracked into the North Fork John Day River. This suggests that subadult migrations do seasonally occur within lower river segments of the Upper Mainstem, North Fork, and Middle Fork John Day River. Within the John Day Subbasin, historic bull trout distribution likely included seasonal use of the entire mainstem and larger tributaries. Bull trout from the John Day Subbasin were known to migrate to and from the Columbia River (Buchanan *et al.* 1997). Historical records indicate presence of bull trout in Dads Creek, Dixie Creek, Pine Creek, Canyon Creek, Laycock Creek, and Beech Creek (Buchanan *et al.* 1997) all below 1,800 ft in elevation. The lower segments of the John Day Basin currently have many PCEs, including permanent water with low levels of contaminants, stream temperatures from 36° to 59° F (2° to 15° C), complex stream channels, and an abundant food base. Lower segments of the John Day River are typically suitable for bull trout use during peak runoff periods in late winter and spring when water temperatures range from 36° to 59° F (2° to 15° C). During those periods, these streams contain the necessary features essential to the conservation of the bull trout because they serve as migratory corridors that connect local populations in the basin. Such connections are particularly critical in the John Day River Basin because the existing local populations are small and highly vulnerable to localized extirpation. The most viable way to avoid extinction in these areas is to maintain seasonal habitat connections so that the movement of fish between them can sustain or periodically re-establish these small populations. We recognize the apparent difficulty in designating critical habitat where the presence of the PCEs is sporadic. To avoid future misinterpretations of the effect of this designation where PCEs occur as a result of current ongoing federal management, we have included that management in the baseline for future section 7 consultations.

Unit 9: Umatilla/Walla Walla River Basin

(72) *Comment:* There are many examples of additional special management and protections governing habitat utilized by bull trout on BLM-managed lands including the South Fork of the Walla Walla River ACEC, which is an amendment to the Resource Management Plan (RMP) for the Baker Resource Area of the Vale District. The amended plan was signed in February 1992, creating an ACEC of 1,273 acres within the South Fork of the Walla Walla River watershed. The river provides high quality spawning and rearing habitat for bull trout. The decision included: (1) No surface occupancy stipulation for oil and gas leasing; (2) prohibition against development of mineral resources within the ACEC boundary unless needed on an emergency basis to protect ACEC values; (3) prohibition against issuance of grazing leases; (4) no fire salvage will occur unless it meets the goal of ACEC management; and (5) reduction by 99% of the permitted amount of timber removed on the 120 acres of commercial timberland economically operable within the ACEC.

Our Response: We agree that the designation in 1992 of the South Fork Walla Walla River as an Area of Critical Environmental Concern added habitat protections that benefit bull trout. The ACEC management actions in the plan amendment, particularly the livestock grazing restrictions and measures to limit and control recreational motor vehicle traffic along the river, are actions that have improved bull trout habitat along the approximately two miles of river that cross BLM land. As a result we have determined this lads do not meet the definition of ''in need of special management or protection'' in order to be designated as critical habitat.

Unit 10: Grande Ronde River Basin

(73) *Comment:* Wright Slough (Grande Ronde River Basin) has been designated as critical habitat and should not have been. It now has restrictions on it that are impacting agricultural use of the land.

Our Response: Wright Slough, a tributary of the Grande Ronde River, was not designated as critical habitat for bull trout in the previous final rule and is not being designated in this rule. The mainstem Grande Ronde River immediately above and below where Wright Slough enters the river is designated as bull trout critical habitat. The State of Oregon has designated Wright Slough as ''essential salmonid habitat'', which may have been confused with bull trout critical habitat. Critical habitat does not create a preserve and does not, by itself, place restrictions on agricultural land use. If, through section 7 consultation, a proposed Federal action was found to destroy or adversely modify critical habitat, then a reasonable and prudent alternative may result in restrictions on agricultural use. We have not issued any adverse modification biological opinions on bull trout critical habitat and therefore have not imposed any restrictions on agricultural use of lands in Wright Slough through designation of critical habitat.

(74) *Comment:* It is not appropriate to designate critical habitat in the Powder River Basin in areas located below 4,500 ft elevation to prevent extinction of bull trout because these low elevation streams do not have appropriate water temperatures.

Our Response: We acknowledge that temperatures in the lower portions of the Powder River Basin are likely only suitable for bull trout use during peak runoff periods in late winter and spring. During these times, lower elevation areas contain the features that are essential to bull trout conservation. These areas are important because they

serve as migratory corridors that connect local populations in the basin. Such connections are particularly critical in the Powder Basin because the existing local populations are small and highly vulnerable to localized extirpation. The most viable way to avoid extirpation in these areas is to maintain seasonal habitat connections so that the movement of fish between them can sustain or periodically re-establish these small populations. We have also indicated that current federal management is included in the baseline so as to ensure that existing PCEs—in this case migrating corridors are maintained without implying that other PCEs are present or require special management or protections.

(75) *Comment:* The previously designated stream segments in the Powder River Basin below the Wallowa-Whitman National Forest boundary are not essential for conservation of bull trout, because: (1) The presence of brook trout downstream of most known bull trout populations and the large number of existing physical barriers in low-elevation stream sections preclude genetic exchange between local populations and attempts to provide connectivity will result in increased hybridization; (2) given the physical and biological barriers, it would be advisable to keep resident bull trout populations in the upper tributaries to prevent brook trout hybridization; (3) the listed segments lack almost all of the identified PCEs and, in fact, dry up or go subsurface for much of the year; and (4) with the single exception of Big Muddy Creek, all observations of bull trout have been above the National Forest boundary, thus the stream sections below the boundary are unoccupied.

Our Response: It is true that many of the Powder River tributaries contain impediments to bull trout movement, particularly those that flow through the Baker Valley, where the stream channels and stream flows have been altered for many years to support agricultural production. We also concur that brook trout hybridization is a problem in this area. Nevertheless, the designated tributary streams are deemed essential for bull trout conservation for the following reasons: (1) These streams are occupied and contain PCEs; (2) given the small size of the local populations, which appear to be currently confined to upper elevation headwaters, it is highly unlikely that they will persist in isolation, thus the long-term viability of this core area is dependent on the ability of bull trout to move between populations; and (3) the impediments to seasonal fish movement in these streams are mostly human-caused and could feasibly be corrected. The lower reaches of these streams can function as effective movement corridors even if only during high runoff periods; their designation as critical habitat does not imply that they need to be maintained as suitable habitat year-round. Therefore, we have designated critical habitat in these areas. In addition our inclusion of present operations in the baseline is designed to recognize the particular contributions of the area to bull trout conservation without overstating them.

(76) *Comment:* We believe that fish survey data from the Powder River Basin has been misused because: (1) No accepted, scientific protocol was used for many of the surveys; (2) some of the fish counts were erroneous and contained inaccurate information; (3) some purported sightings and inferences about habitat use were not supported by scientific data; (4) credible evidence provided by local citizens, indicating that bull trout were introduced in the early 1900s into upper tributaries of the Powder River, was ignored or disregarded.

Our Response: It is our intent to use only accurate information about species' occurrences when identifying critical habitat. To address the concerns that were raised about data from the Powder River Basin, we conducted a review of all the survey data and anecdotal information we have received on bull trout locations in this area. The sources and documentation associated with these data have been re-checked and verified to the extent possible. Some of the bull trout sighting information comes from informal surveys that did not follow standardized survey protocols because surveys were done before formal survey protocols existed and in other situations ''spot check'' type surveys were done because the resource agency lacked sufficient resources to conduct more rigorous surveys. It would not be appropriate to disregard positive sightings just because the survey method was informal. The key credibility factor is the fish identification skills of the person making the observation. Also of major importance is the type of observation (*i.e.*, was the fish in hand or just seen swimming by).

In our review of existing data, we excluded from consideration sightings that did not meet the following two criteria: (1) The sighting was made by a biologist or technician that was trained and experienced in bull trout identification, and (2) the identification was made based on close examination of a fish in hand. We cannot verify the assertion that bull trout were introduced by man to the upper Powder River Basin and thus are not native to the area. We are not ignoring or disregarding the reports that suggest bull trout may have been planted in some streams in the Elkhorn Mountains in the early 1900s. It is just not possible to verify those reports or to conclude from them that bull trout did not exist in the area prior to those introductions. Documented information on the historic distribution of bull trout in other nearby Snake River tributaries is compelling evidence that they are likely native inhabitants of the Powder River.

(77) *Comment:* Data on reported bull trout sightings in Rock Creek and Pine Creek are not scientifically valid.

Our Response: A bull trout/brook trout hybrid was reported in surveys of Rock Creek conducted by ODFW in 1994. Tissue samples were not collected so positive identification of this fish as a hybrid or pure bull or brook trout is not possible. Follow-up surveys conducted by the USFS did not detect any bull trout in Rock Creek, but surveyors did not search the upper portions of Rock Creek and North Fork Rock Creek, nor did they search about 0.7 mile of creek below Eilertson Meadow. Reaching the conclusion that bull trout are absent from this creek will require regular, repeated surveys using the same protocol. Bull trout have been observed, by professional fish biologists, in Pine Creek and Salmon Creek. Memoranda from Mark Lacy in 1995 (a BLM Fish Biologist at the time) and Jackie Dougan (then a USFS Fish Biologist) to Jeff Zakel (ODFW) provide information on bull trout sightings in these drainages in 1994–1995. Therefore, we have designated critical habitat in these areas.

(78) *Comment:* Special management considerations are already provided through the Powder Basin Subbasin Plan and the Powder/Brownlee Agricultural Water Quality Management Area Plan.

Our Response: We have conducted a thorough analysis of the Powder Basin Subbasin Plan and the Powder/Brownlee Agricultural Water Quality Management Area Plan to determine if the benefits of excluding areas covered by these plans from critical habitat outweigh the benefits of including them. We have determined that this plan does not provide a direct conservation benefit to bull trout or any certainty that it will be implemented. Therefore, we have not used these plans as a basis for exclusion.

Unit 13: Malheur River Basin

(79) *Comment:* Do not exclude the Malheur Basin because the Forest Service has not fully implemented INFISH and has failed to effectively modify and suspend its authorized grazing practices required under INFISH. The matrix of pathways and indicators included in the Forest Service 1999 biological assessment documented ratings of ''functioning'' and fail to meet standards. The grazing program on the Malheur National Forest is maintaining degraded baseline conditions according to a 2004 Service biological opinion. In addition, grazing effects on the Malheur River are likely to restrict bull trout range expansion or at least slow recovery efforts substantially. Information provided by the U.S. Forest Service did document maintenance of a degraded condition for certain indicators. The Forest Service rated grazing allotments as maintaining the current conditions with the expectation that they would meet the requirement of a near natural rate of recovery if the allotments were grazed according to standards. This and other information provided by the Forest Service helped form the basis for the Service's biological opinions referenced by the commenter. The Service has expressed concerns in the past with grazing effects to bull trout on the Malheur National Forest and is working closely with the Forest Service to help decrease impacts to bull trout and their habitats due to grazing activities.

Response: The Malheur National Forest recently completed its 2004 grazing monitoring report which provided information and summaries/explanations of data analyzed, collected, or submitted during the 2004 field season. The Forest Service also provided documentation to satisfy the reasonable and prudent measures contained in the Service's 2004 biological opinions by summarizing information collected in 2004. The Forest Service recommends potential management strategies for the 2005 Annual Operating Instructions that are consistent with PACFISH and INFISH. A critical habitat designation will not result in improvement of the conditions in the areas designated in and of itself. Critical habitat designation can only prevent erosion of the baseline levels of the PCEs. Forest Service management under INFISH actually takes positive steps to improve conditions in the aquatic habitat. The Forest Service expects that these strategies will move riparian and stream conditions towards desired conditions. The Service will continue to work with the Forest Service, and assist them in development and implementation of appropriate and effective monitoring strategies. In addition, we have determined that the Malheur National Forest management plan as currently implemented provides at least the same special management and protection as a critical habitat designation and goes beyond what a critical habitat designation provides by enhancing and restoring habitat. We have determined under Forest Service management that the Malheur National Forest does not meet the definition of critical habitat in 3(5)(a) and we have excluded the Malheur National Forest from critical habitat because the benefits of excluding areas covered under PACFISH and INFISH outweighed the benefits of inclusion (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

Unit 16: Salmon River Basin

(80) *Comment:* Not all bull trout habitat in the Salmon River basin should be critical habitat.

Our Response: Not all bull trout habitat in the Salmon River basin has been proposed or designated as critical habitat. Numerous streams were not proposed for designation for any, or a combination of, the following reasons: (1) Bull trout are not known to be present; (2) the habitat has low or no potential for bull trout occupation (low elevation, inherently warm water, not historically occupied, etc.); (3) the habitat does not currently contain, or have the potential to contain, one or more PCEs; and (4) the habitat was deemed not necessary to meet draft recovery plan objectives (i.e., non-essential potential populations).

Of those streams that were proposed as critical habitat, not all were designated. Areas covered under PACFISH, INFISH, and the Snake River Basin Adjudication were excluded (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(81) *Comment:* Salmon River bull trout are very healthy and not at risk.

Our *Response:* While it is true that Salmon River bull trout populations are relatively healthy, they are located in areas that contain the features essential to the conservation of bull trout. Areas that are already adequately protected by other management plans, and where the benefits of excluding areas from critical habitat outweigh the benefits of inclusion, exclusions have been applied (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(82) *Comment:* Bull trout are rare in Jordan Creek of the Upper Salmon River and critical habitat should not be designated there.

Our *Response:* We did not exclude areas based on rarity of bull trout. The 2002 critical habitat proposal included stream segments known to be occupied. In our analyses of the species for the draft recovery plan and proposed critical habitat for bull trout, we determined that it is necessary to maintain as many currently occupied areas as possible to facilitate recovery of the species. Jordan Creek supports a local population of bull trout. It is likely that the local population occurring in Jordan Creek was historically, and is currently, supported by migratory bull trout from the Yankee Fork and larger streams, although monitoring has not yet observed this life history strategy. Lower Jordan Creek is important for providing connectivity between the bull trout local population above the mine and larger area of overwintering habitat below. Local populations not connected by migratory fish are believed to be at a substantially greater risk of extirpation.

Unit 17: Southwest Idaho River Basins

(83) *Comment:* Exclude Boise, Payette, and Weiser river basins for economic and social reasons in addition to exclusions based on the Snake River Basin Adjudication plan.

Our Response: In our 2002 proposed critical habitat rule we proposed approximately 2,792 km (1,735 mi) of streams in the Boise, Payette, and Weiser river basins. The economic analysis did not identify costs justifying an economic exclusion with the Snake River basin. Section 4(b)(2) of the Act allows us to consider the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. Therefore, the Secretary of Interior has excluded the area covered by the Snake River Basin Adjudication plan based on collaborative partnerships that have resulted in a settlement agreement benefiting bull trout conservation and where the benefits of excluding these areas outweigh the benefits of including them in the designation (Exclusions Under Section 4(b)(2) section below). The Secretary received inadequate information to make a determination that the economic and social benefits of exclusion outweighed the benefits of the designation.

(84) *Comment:* Many areas in Southwest Idaho do not have sufficient PCEs.

Our Response: The 2002 proposed critical habitat rule was developed based on the best available information at that time. In order for a stream to be proposed as critical habitat, it must have sufficient PCEs to sustain at least one

essential life process of the species. However, a stream did not have to contain all PCEs to be proposed as critical habitat. In fact, many streams in southwest Idaho do not have all of the PCEs, but do have sufficient PCEs for bull trout to meet this standard. Streams that did not contain the necessary habitat for bull trout (*e.g.*, including one or more primary constituent elements), and streams inherently incapable of becoming bull trout habitat were not proposed for designation. Those streams that were included will have existing conditions included in the baseline for future section 7 consultations.

Unit 19: Lower Columbia River Basin

(85) *Comment:* Describe the validity of Cougar Creek, a tributary to Yale Reservoir in the Lewis River critical habitat sub-unit (CHSU), as part of the critical habitat designation.

Our Response: The Settlement Agreement Concerning the Relicensing of the Lewis River Lewis River Hydroelectric Projects (Agreement) includes a perpetual conservation easement on PacifiCorp's lands in the Cougar/Panamaker Creek area. The measures included in the conservation easement and the settlement agreement provide a high level of conservation benefit to the bull trout PCEs in Cougar Creek. We have determined that lands covered under conservation easements and the Agreement should be excluded from the designation of critical habitat because the benefits of excluding them outweigh the benefits to the species by including them in the designation. Please refer to our discussion concerning the exclusion of Lewis River Hydroelectric Projects Conservation Easements in the Section 3(5)(a) and Exclusions under Section 4(b)(2) of the Act section below.

(86) *Comment:* Rush Creek in the Lewis River CHSU should be included in critical habitat even though it is covered by the Northwest Forest Plan.

Our Response: All National Forest lands covered by the Aquatic Conservation Strategy of the Northwest Forest Plan have been excluded from the final designation because the Secretary determined that the lands did not meet the definition of critical habitat and the benefits of exclusion outweighed the benefits of inclusion (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

Unit 21: Upper Columbia River

(87) *Comment:* Special management activities within Priest Rapids project should be excluded.

Our Response: The Service has considered the special management activities within the Priest Rapids project area for this rule. Currently there is no biological opinion for bull trout or a settlement agreement in place addressing the PCEs for bull trout for the Priest Rapids Dam project area, and the PCEs for bull trout are not addressed by any other current management activities. The NOAA Fisheries biological opinion only covers salmon species. Although some habitat characteristics are similar for salmon species and bull trout, the PCEs have several differences. The Service Interim Guidelines for bull trout list some of these differences, which include the following: Fish passage and performance measures for salmon are not the same as they are for bull trout; bull trout exist year round in the area and are more closely associated with stream substrates; and, they also require a prey base year round. However, since the area does contain PCEs under current ongoing management, that management will be considered part of the baseline in future section 7 consultations.

(88) *Comment:* Additional consultation requirements for critical habitat negatively affect Grant County by increasing workload.

Our Response: Because all areas in this designation are considered occupied, section 7 consultation for the bull trout would be required in all cases where consultation on bull trout critical habitat would be required. The Service has data documenting bull trout occurrence throughout many areas of the mainstem Columbia River, particularly between Priest Rapids pool and the Okanogan River. Fish from the Upper Columbia River Recovery Unit have been documented using this area to fulfill critical elements of their life cycle. A review of the amount of work associated with the incremental costs of completing consultations on bull trout critical habitat revealed that it was relatively minor.

(89) *Comment:* Wells, Rocky Reach, Rock Island, and Comprehensive Bull Trout Monitoring and Management Plans (WBTMP, RRBTMP, RIBTMP, CBTMP), as well as the Anadromous Fish Agreement, Rocky Reach, Rock Island, and Douglas PUD Wells Hydro Project HCPs provide needed benefits to bull trout and their PCEs and should be excluded from critical habitat.

Our Response: The Service has considered these plans in our evaluation of critical habitat. The biological opinion and comprehensive BTMPS do not fully cover all PCEs nor do they address all recovery tasks or issues for bull trout in the upper mid-Columbia area. The BTMPs are limited to the requirements of the biological opinion and it is unclear if other PCEs will be addressed. The specific studies are designed to be implemented with specific timeframes which generally will be implemented every 10 years through the life of the plan (50 years). The goals of the Protection, Mitigation, and Enhancement measures in the BTMPs are to identify, develop, and implement measures to monitor and address ongoing impacts to bull trout resulting from project operations. The BTMPs incorporate ''Reasonable and Prudent Measures'' which are required by the Service Biological Opinion for the Rock Island, Rocky Reach, and Wells hydroelectric project operation. These measures will address the ''complex stream channels (PCE #3) and ''migratory corridors'' (PCE #7) for bull trout. The Service biological opinion states that other PCE's are expected to be maintained or enhanced, but at this time it is unclear where or when any of the habitat restoration projects for the tributary enhancement provisions will occur. Therefore, we do not believe that these plans are an appropriate basis for exclusion.

Unit 22: Northeast Washington

(90) *Comment:* The critical habitat designation is inconsistent with the inclusion of Box Canyon Reservoir.

Our Response: The Service acknowledges that the reservoir exclusion in the previous final rule was not applied consistently. In this final rule we are excluding all reservoirs that provide a flood control, water supply function, or energy generation. Although the Box Canyon Reservoir does not meet this criteria, it is being excluded because it is within the Federal Columbia River Power System (FCRPS) action area (see Section 3(5)(a) and Exclusions under Section 4(b)(2) section below).

(91) *Comment:* The Service needs to add the proposed critical habitat areas of the Northeast Washington Unit back in the designation.

Our Response: We have evaluated which areas meet the definition of critical habitat for bull trout and excluded areas where we have determined that the benefits of excluding those areas outweigh the benefits of including them as critical habitat (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

Unit 26: Jarbidge River

(92) *Comment:* Maintaining connectivity is important for the Jarbidge River population and it is not

clear if connectivity is included in the PCEs for this population.

Our Response: We agree that migratory corridors are important and provide connectivity among local populations and access between spawning, overwintering, and foraging habitats within the Jarbidge River population area. The Jarbidge River bull trout population has been isolated from other bull trout populations by dams and diversion structures for over 100 years (Gilbert and Evermann 1894). The distance between occupied habitats in the Jarbidge River and Columbia River populations is approximately 150 river miles (rmi) (240 river kilometers (rkm)). Critical habitat was not proposed for these areas of unknown bull trout occupancy.

(93) *Comment:* Salmon Falls Creek, Idaho should be designated as critical habitat for the Jarbidge River bull trout population.

Our Response: Salmon Falls Creek is not occupied by bull trout, and therefore under the Act, it cannot be designated as critical habitat unless it is essential for the conservation of the species. Salmon Falls Creek is a tributary to the Snake River in Idaho. It historically provided spawning and rearing habitat for anadromous fish, including Chinook salmon (*Oncorhynchus tshawytscha*) and steelhead. Since Salmon Falls Creek Dam was constructed in 1910, the lower 30 mi (48 km) of the stream have been significantly altered by upstream reservoir storage and water diversions. Migration barriers, water diversions, high water temperatures, sedimentation, and nonnative fish introductions are likely contributing factors to the loss of anadromous fish species in this watershed. This watershed is outside the boundary of the geographical area occupied by the Jarbidge River bull trout population, and bull trout from the listed Jarbidge River population do not have access to Salmon Falls Creek due to a number of intervening dams and diversion structures. Due to poor bull trout habitat quality and inaccessibility it is not essential for the conservation of the Jarbidge River population, and is not included in the designation.

(94) *Comment:* Buck Creek, a tributary to the West Fork of the Jarbidge River, should be added to critical habitat designated for the Jarbidge River population because it is similar to adjacent known occupied bull trout streams and could support multiple life history requirements of bull trout.

Our Response: Bull trout have not been documented in Buck Creek or its tributaries during infrequent surveys (G. Johnson, Nevada Department of Wildlife, in litt 1993a, b; G. Johnson, NDOW, pers. comm. 2003). We are currently unable to determine that Buck Creek is essential to the conservation of the species based on its undocumented use by bull trout and potentially disconnected reaches of suitable habitat. Because we cannot be certain that this habitat would ever be occupied by bull trout, the Secretary could not make a determination that is essential to the conservation of the species, and thus did not designate it as critical habitat.

(95) *Comment:* Critical habitat should include the entire hydrologic watershed for the East/West Forks of Jarbidge River, Jarbidge River, and Bruneau River.

Our Response: We acknowledged in the proposed rule that upstream habitat, as well as adjacent terrestrial habitat, can influence the quality of aquatic habitat downstream. Although the East and West Forks of the Jarbidge River, as well as the mainstem river, are occupied bull trout habitats containing features essential to the conservation of the species we have excluded these areas from the designation after carefully weighing the benefits of inclusion versus the benefits of exclusion (see Section 3(5)(a) and Exclusions under Section 4(b)(2) section below).

Although the Bruneau River has been identified as bull trout habitat in some publications (Conley 1993; Lee *et al.* 1997), there are no records documenting bull trout use. Bull trout may have migrated from the Snake River through the lower Bruneau River and into the Jarbidge River for spawning, similar to Chinook salmon. Bull trout from the Jarbidge River have access to the Bruneau River, and we support implementing research to detect seasonal use of the Bruneau River by bull trout. Research could clarify the importance of the habitat to potential numbers of large migratory bull trout if the Jarbidge River population expands.

Unit 27: Olympic Peninsula

(96) *Comment:* The Quinault River consists of surface water from Lake Quinault and thus has an unsuitable temperature profile for bull trout. It is also part of the Quinault Indian Nation lands; therefore, it should not be designated as critical habitat.

Our Response: Temperatures in the Quinault River are influenced by temperatures in Lake Quinault, and during certain times of the year those temperatures likely exceed optimum temperatures for bull trout. Temperatures are naturally warm in the summer in the Quinault River below Lake Quinault. Bull trout have been documented in tributaries to the lower Quinault River and in the river itself. Water temperatures in the river change in response to the season (colder in winter, warmer in summer). Bull trout seasonally use the river when temperatures are cooler. Also, the river contains a prey base for the bull trout. We do not expect the water temperature profile to change in the future and expect that bull trout will continue to use the river. The nearshore land adjacent to the lake affects water quality in the lake. Only a small portion of the shoreline and habitat that affects the lake is within the Quinault Indian Reservation. The portion of the nearshore that is within the reservation, and included in the Quinault Forest Management Plan, is excluded from critical habitat.

(97) *Comment:* The Quinault River downstream of Lake Quinault does not require special management and therefore should be excluded.

Our Response: That area is addressed in the Quinault Indian Reservation's Forest Management Plan and is excluded from the Quinault River downstream of Lake Quinault.

(98) *Comment:* Cook Creek is poor habitat and inappropriate as critical habitat.

Our Response: Cook Creek has documented bull trout occurrence. The habitat quality is rated as ''fair to good'' by an analysis of limiting factors for the Quinault River watershed (WSCC 2001). Monthly temperature data indicate that stream temperatures are within the temperature range given in PCE 1 (see Primary Constituent Elements section below) and are suitable for bull trout most of the year. The summer temperatures in the creek are colder than in the river, and Cook Creek likely provides important cold water refuge during the summer months, as well as forage during certain periods of the year. The portion of Cook Creek, from its mouth to approximately rmi 4.8 (rkm 7.7), is addressed in the Forest Management Plan for the Quinault Indian Reservation and excluded from designated critical habitat.

(99) *Comment:* The Raft River and other coastal streams need further evaluation before being designated as critical habitat.

Our Response: The Raft River and other coastal streams have documented foraging and overwintering habitat, features essential for bull trout conservation. Although these streams and rivers do not support spawning bull trout populations, they seasonally do provide foraging and overwintering habitat for bull trout that spawn in other coastal rivers. The portion of the Raft River included in the Quinault Indian Reservation Forest Management Plan is

excluded from designated critical habitat.

(100) *Comment:* The proposed rule states that the Quinault Tribe owns less than 1 percent of proposed critical habitat and this underrepresents actual ownership.

Our Response: After further review, our Geographic Information System (GIS) indicates that the Quinault tribal ownership is 2.7 percent of the proposed critical habitat designation for the Coastal-Puget Sound bull trout population.

(101) *Comment:* Certain beach areas should be excluded because they are owned by the Quinault Indian Nation.

Our Response: There are areas in nearshore marine waters adjacent to beach areas owned by the Quinault Indian Nation that have features essential to bull trout conservation. However, these beach areas are not addressed in the Quinault Indian Reservation Forest Management Plan. These nearshore marine waters may be affected by activities such as development, bank armoring, bulkheading, or dredging occurring in or near the beach and shoreline areas. Therefore, these areas require special management considerations or protections to ensure any proposed Federal actions do not destroy or adversely modify the critical habitat, and thus are designated as critical habitat.

(102) *Comment:* The Skokomish Tribe's lands, and other tribally owned lands in that vicinity, do not provide important contributions to critical habitat because they are below 500 feet (ft) (152 meters (m)) elevation in areas where there is no spawning and rearing habitat.

Our Response: The portion of the Skokomish River within the Skokomish Reservation boundaries is below 500 ft (152 m) elevation. However, this area and other tribal lands below 500 ft (152 m) in elevation provide important foraging, migratory, and overwintering habitat for bull trout. These habitats contain the features essential to the species' conservation, especially the fluvial and amphidromous life history forms. However, this portion of the Skokomish River is excluded from designated critical habitat based on the Skokomish Tribe's conservation program. Portions of waterbodies within or adjacent to Swinomish, Muckleshoot, Jamestown S'Klallam, Hoh, Skokomish and Quinault tribal lands are also excluded (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(103) *Comment:* Additional Hood Canal nearshore habitat should be included in the designation.

Our Response: Critical habitat is designated on the south and west shores of Hood Canal based on the presence of PCEs, availability of forage fish, and the proximity to streams known to be occupied by bull trout. We have no information suggesting that bull trout use streams draining into the eastern shore of Hood Canal. Therefore, we have not designated critical habitat along the eastern shore.

(104) *Comment:* The Skokomish Tribe has adequate management in place, or in preparation, that precludes the need to designate critical habitat.

Our Response: The Skokomish Tribe has a conservation program that provides aquatic resource protection and restoration through a number of collaborative efforts on the reservation and other trust lands. As a result, we are excluding from this critical habitat designation those portions of the Skokomish River, Nalley Slough, Skobob Creek, and Hood Canal nearshore within the Skokomish Indian Reservation.

(105) *Comment:* The U.S. Navy (Navy) believes that the area proposed for extending the Naval Undersea Warfare Center, Division Keyport (NUWC Keyport) should be excluded based on planned section 7 consultations.

Our Response: We do not exclude areas based on future section 7 consultations. However, NUWC Keyport has an approved INRMP that provides a benefit to the species for which critical habitat is proposed for designation. Therefore it has not been included in the final critical habitat designation, per section 4(a)(3) of the Act (see Non-inclusions under Section 4(a)(3) section below).

(106) *Comment:* The Wynoochee, Satsop, and Canyon Rivers are not appropriate critical habitat.

Our Response: This designation is based on the best scientific and commercial information available and only includes habitat where bull trout have been documented and which contains features essential to bull trout conservation. Bull trout often migrate long distances from their natal streams to find suitable foraging or overwintering habitat. Streams that are not known to contain spawning bull trout populations were included in critical habitat when they provide documented foraging, migratory, and overwintering habitat for bull trout. Although not known as spawning streams, the Wynoochee, Satsop, and Canyon Rivers contain PCEs of critical habitat and bull trout use these areas for foraging, migrating, and overwintering. Therefore, we have included these areas in the designation.

(107) *Comment:* The Navy believes that training and testing areas, including Crescent Harbor, Hood Canal, and Dabob Bay, should be excluded from critical habitat.

Our Response: The area of Hood Canal, outside of Dabob Bay, where the Navy conducts activities, is not within or adjacent to proposed critical habitat and is not included in final critical habitat. The Navy conducts training and testing within the marine waters of Crescent Harbor and Dabob Bay. Because these activities are conducted in open marine waters, they are not included in the military's INRMPs. However, limitations on access to, the use of, or the enhancement of the existing capabilities and capacities of these ranges would limit or curtail both testing and fleet support functions performed by NUWC Keyport for undersea warfare.

These areas have been defined on National Oceanic and Atmospheric Administration (NOAA) charts for over 50 years and operating areas have been further delineated in recent public environmental documentation. NEPA analyses, conducted for these areas within the past 5 years, include biological assessments evaluating effects on endangered species that were reviewed and approved by NOAA-Fisheries and the Service. These biological assessments and associated environmental assessments addressed bull trout and interactions with range operations. Based on the above considerations, the importance of these areas for national security, and consistent with direction provided in section 4(b)(2) of the Act, the Navy training and testing areas of Crescent Harbor and Dabob Bay have been excluded from designated critical habitat (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(108) *Comment:* What are the conservation values of the upper North Fork Skokomish River and Lake Cushman? Designation of habitat in these areas conflicts with the Service's decision not to propose critical habitat in highly fragmented areas.

Our Response: Although hydroelectric dams have affected bull trout in the North Fork Skokomish River, and the two dams operated by Tacoma City Light prevent upstream and downstream passage of bull trout, we do not believe that this results in ''highly fragmented habitats in highly fragmented areas.'' The North Fork Skokomish River represents a significant amount of

remaining bull trout habitat along Hood Canal and is essential to the conservation and recovery of bull trout in the Skokomish core area and thus, is not excluded from the critical habitat designation.

(109) *Comment:* The Service erroneously assumes that there is downstream connectivity between bull trout located in the upper North Fork Skokomish River and bull trout located in other parts of the Skokomish River.

Our Response: Historic accounts (since the 1920s) indicate bull trout were present in the original Lake Cushman and upper North Fork Skokomish River prior to the river's impoundment. Bull trout in Lake Cushman and the upper North Fork Skokomish River have been continually monitored since 1970, and surveys have counted bull trout there as recently as 2004. This area comprises one of two local populations in the Skokomish River area. Construction of the two dams has largely eliminated downstream migration and interaction with bull trout in the South Fork Skokomish River, although for other hydroelectric projects it is well documented that fish do occasionally escape mortality through turbines or are spilled downstream of a dam.

(110) *Comment:* The Service inappropriately assumes that connectivity for the upper North Fork Skokomish River and Lake Cushman will be enhanced in the future.

Our Response: Recovery of bull trout in the Skokomish River core area will require addressing connectivity in the North Fork Skokomish River. Bull trout were documented in Lake Cushman and the North Fork Skokomish River above the lake in 2004. Bull trout have also been recently documented in the North Fork Skokomish River below the dams. Bull trout have not been documented in the section of the river between the two dams (Lake Kokanee), and this section is not being designated based on the Federal Energy Regulatory Commission (FERC) license requiring passage at both dams. Implementation of the FERC license for the Cushman Project is expected to result in the construction of trap-and-haul fish passage facilities that will restore connectivity between the lower and upper North Fork, but will bypass and isolate the inundated 2.3 mile long Lake Kokanee segment. Requiring fish passage at the Cushman dams is part of the 1998 FERC license order and is the best available information at this time (FERC 1998).

(111) *Comment:* The upper North Fork Skokomish River should be excluded from critical habitat designation because it is located almost entirely within Olympic National Park (Park), and the Park should be excluded because of their land use restrictions.

Our Response: At present, the Park does not have a general management plan that guides the Park's management and provides for bull trout conservation. A general management plan is currently under internal Park review and is scheduled to go out for public review in the next year or so. It is our understanding that the plan will present several alternatives ranging from increased visitor access and development to more resource protection. We do not know how this plan will address bull trout conservation but will review the Park's plan when it becomes available. Because there is no plan that we can review to determine if the Park will provide the appropriate special management required for the conservation of bull trout PCEs in that area this area was not excluded from the critical habitat designation.

Unit 28: Puget Sound

(112) *Comment:* Quilceda Creek and its tributary Edgecombe Creek in Washington should be designated critical habitat.

Our Response: Although it is possible that bull trout foraged in these two creeks in the past and may currently use these streams on occasion to forage, there is no clear documentation of the use by bull trout in this system. This does not mean these streams cannot or will not contribute to bull trout recovery, but rather that they were not determined to be essential to the species' conservation, and thus are not designated as critical habitat.

(113) *Comment:* The U.S. Army (Army) requests that the marine nearshore areas and Nisqually River adjacent to Fort Lewis be excluded from designation of critical habitat because of the existing INRMP. For its installations, the Navy believes that existing INRMPs for Whidbey Island Seaplane Base and Naval Station Everett provide justification for their non-inclusion from critical habitat.

Response: Fort Lewis has an approved INRMP that provides a benefit to the species for which critical habitat is proposed for designation. Therefore areas covered by the INRMP have not been included in the final critical habitat designation, per section 4(a)(3) of the Act (see Non-inclusions Under Section 4(a)(3) section below).

(114) *Comment:* The designation is not appropriate for four streams, three pocket estuaries, and the nearshore waters of, and adjacent to, the Swinomish Tribal Reservation.

Our Response: We believe that the nearshore areas are essential based on the current use of these areas by amphidromous bull trout for foraging and migration, and because they contain the PCEs. Therefore, only the marine nearshore waters, including the Swinomish Channel, associated with the Swinomish Reservation were proposed and designated as critical habitat. The other four streams were not part of our proposal.

(115) *Comment:* The Swinomish Tribe's habitat management plan provides a sufficient level of protection to bull trout and their habitat, and therefore those portions of waterbodies on or adjacent to Swinomish tribal lands should be excluded from the designation.

Our Response: We have excluded those lands covered by the Swinomish Tribe's habitat management plan (see Section 3(5)(A) and Exclusions under Section 4(b)(2) section below).

Comments From States

Nevada

(116) *Comment:* Those most affected by the designation have not been involved in this designation of critical habitat for the Jarbidge River population of the bull trout.

Our Response: Throughout the process of designating critical habitat, we attempted to include those interested in the designation of critical habitat for the Jarbidge River population, as well as the Coastal-Puget Sound and Saint Mary-Belly River populations, of the bull trout in the rule-making process. We solicited public comment through two public comment periods and one public hearing, accepting oral and written comments. We also held four local public meetings in Idaho and Nevada specifically regarding critical habitat proposed for the Jarbidge River population. We diligently tried to be responsive to the concerns raised and to address those concerns during the development of this final critical habitat designation.

(117) *Comment:* No information is presented to suggest that conservation of the Jarbidge River population is necessary to ensure the persistence of bull trout in the coterminous unit.

Our Response: We considered all available data on the Jarbidge River bull trout population during the listing process (63 FR 31693, 64 FR 17110, 64 FR 58910), and available data that developed since the listing, to designate critical habitat for the Jarbidge River bull trout population. The Jarbidge River population is located in the southernmost habitat currently

occupied by bull trout. This population is geographically segregated from other bull trout in the Snake River basin by more than 150 rmi (240 rkm) of unsuitable habitat and several impassible dams on the mainstem Snake River and the lower Bruneau River. It is, however, essential to the conservation of bull trout as a whole, as discussed in the draft recovery plans.

(118) *Comment:* Streams within the Jarbidge River population range have not been demonstrated to contain PCEs for bull trout.

Our Response: All streams identified as essential and designated as critical habitat for the Jarbidge River population contain one or more of the PCEs. Only those streams with documented bull trout occurrence are designated. Variable types and amounts of habitat data are available for these streams to document the presence of PCEs and are in our administrative record for this final rule.

(119) *Comment:* Many plans already in place for bull trout protection don't need critical habitat (the comment letter listed many plans).

Our Response: Although there are many plans currently in place that directly or indirectly benefit bull trout, many are interim measures, they improve water quality only, there is no formal management plan, or they are designed to improve habitat on small scale watersheds. Where we could determine that the plans provided protection or management equal to that of a critical habitat designation, we have not included those lands, or otherwise we have designated critical habitat where appropriate (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

Washington

(120) *Comment:* Washington Department of Fish and Wildlife (WDFW) stated that Lake Washington and the Nisqually River are inappropriate as critical habitat because they are little used transient habitats for bull trout from other core areas.

Our Response: Recent tagging studies have clearly shown that amphidromous bull trout have complex migratory patterns within marine waters and between watersheds. We believe that current and future use of foraging, migratory, and overwintering habitats outside their natal basins is essential to the survival and conservation of bull trout, especially the amphidromous life history form. We expect that, as bull trout populations increase in abundance, bull trout use of the Nisqually River and Lake Washington will increase due to the abundant foraging opportunities provided by these systems. Historically, bull trout were reported as abundant in the Nisqually River. In addition, spawning may still occur within the basin as suggested by the recent capture of a smolt-sized bull trout in the Nisqually River delta (C. Ellings, in litt. 2004). These areas therefore, remain in the critical habitat designation.

(121) *Comment:* The proposed critical habitat designation falls short of protecting nearshore habitats essential to the conservation of bull trout by not including the shoreline riparian areas, bluffs, and uplands above the mean higher high water (MHHW) mark. These areas provide lateral recruitment of spawning substrates for surf smelt the principal food source for bull trout in the northern Puget Sound area. With the existing development along the Puget Sound shoreline, the source for suitable spawning gravels for surf smelt is very limited and protection of these last few areas is essential to the conservation of bull trout.

Our Response: We recognize that similar to the influence that riparian and floodplain areas have on stream habitat in freshwater systems, the quality of the habitat within the marine nearshore is intrinsically related to the character of the shoreline riparian areas, bluffs, and uplands, and the human activities that occur above the MHHW mark. Activities that may destroy or adversely modify critical habitat are identified as those that alter the PCEs to an extent that the value of critical habitat for the conservation of bull trout is appreciably reduced, including alterations to foraging habitat and reductions in forage fish abundance. Therefore, although areas above the MHHW mark are not included as critical habitat, in the designation, we recognized the scientific basis for linking the quality of the nearshore environment with the biological and physical processes that occur outside of that environment (see Critical Habitat Designation section below). During section 7 consultations for projects that could cause changes to such areas adjacent to critical habitat, the effects on the critical habitat would be analyzed and protection from adverse modification ensured.

(122) *Comment:* The old Lewis River channel (bypass reach) should be designated as critical habitat.

Our Response: The upper bypass reach was not included in the final critical habitat designation because it does not contain PCEs. Specifically, we do not believe it will support successful bull trout spawning and incubation. The lower segment of the bypass reach from Yale Reservoir to the mouth of Ole Creek is designated as critical habitat, except for that portion of the lower segment covered by the Washington Department of Natural Resources HCP which is excluded under 4(b)(2) (see Exclusions Under Section 4(b)(2) of the Act section below). The remaining lower segment provides foraging, migratory, and overwintering habitat for Yale Reservoir bull trout.

(123) *Comment:* The lower mainstem Lewis River, below Merwin Dam, should not be designated as critical habitat.

Our Response: The lower mainstem Lewis River will provide foraging, migration, and overwintering habitat once fish passage at Merwin, Yale, and Swift Dams is restored. We anticipate increased use by bull trout of the mainstem with these passage improvements. Restoring connectivity among local populations and to the Columbia River is necessary to maintain opportunities for genetic exchange, re-establishment of local populations, and provide access to additional habitat. Recent information documents use of the mainstem Columbia River by adult bull trout for foraging, migration, and overwintering.

(124) *Comment:* WDFW stated that until Condit Dam is removed, it is difficult to justify the designation of the White Salmon River above the dam as critical habitat.

Our Response: There has been a sighting of bull trout in the White Salmon River upstream from Condit Dam as recently as 1989. The designation provides foraging, migration, and overwintering habitat (necessary PCEs) for a potentially remnant population of bull trout within the White Salmon River system. The White Salmon River below Condit Dam is also used by migratory bull trout from other river systems, such as the Hood River. With the restoration of two-way passage at Condit Dam, this will provide access to habitat in the upper White Salmon River for these populations as well.

Oregon

(125) *Comment:* Attributing one third of the consultation costs to bull trout in the economic analysis for the Willamette system is likely too high. Passage modifications at dams in the Willamette would not likely be made solely for bull trout, given the presence of listed salmon and steelhead.

Response: As described in section 2.2.2 of the Final Economic Analysis (FEA), ''[n]o clear allocation of costs can be made between these species, as most of the project modifications would be

sought under both the NOAA and Service consultations.'' Furthermore, the FEA acknowledges the concern regarding the Willamette. It states'' ''one-third of estimated costs are allocated to each [salmon, steelhead, and bull trout] species. This is likely to overstate the cost of bull trout conservation rather than understate it, since the primary driving force behind these project modifications is the salmon'' (pg. 2–24). As a result, we are not excluding this area from the critical habitat designation based on economics.

(126) *Comment:* The Economic Analysis for critical habitat designations in the Malheur Basin is too high. Some operational changes at Beulah Reservoir have already been implemented and cost less than the annual estimate for Bureau of Reclamation (BOR) provided, and additional activities can be done for less than estimated.

Response: As described in section 4.2.4 of the FEA, BOR submitted a comment on the draft economic analysis stating that its ''current average annual cost [associated with bull trout consultation] for the Boise (Anderson Ranch and Arrowrock Reservoirs), Payette (Cascade and Deadwood Reservoirs), Malheur (Buelah and Warm Springs Reservoirs), and Powder (Phillips and Thief Valley Reservoirs) is approximately $250,000 for all projects combined.'' As five of these reservoirs are currently operating under the terms of section 7 bull trout consultations, including Beulah Reservoir, the finding is that such consultations may result in annual fish passage and research costs of $50,000 per year per reservoir (page 4–25). In addition, we received a letter from Oregon DNR indicating the costs attributed to their basin's designation were too high. The analysis was updated with this new information, as reflected in section 4.2.4 of the Final Economic Analysis. As a result, we are not excluding this area from the critical habitat designation based on economics.

(127) *Comment:* Oregon Department of Fish and Wildlife (ODFW) questioned the exclusion of the John Day Basin based on the subbasin plan and Federal Columbia River Power System (FCRPS) given the uncertainty of the implementation of the management actions on mainstem and tributary streams.

Our Response: Programs, plans, and other authorities used to exclude certain areas that were originally proposed, have been re-evaluated to determine their benefit for exclusion versus the benefit of designating as critical habitat. We have revised the rule to now include this area as critical habitat based on this re-evaluation.

(128) *Comment:* ODFW believes that designations of unoccupied habitat are important for the re-introduction of extirpated populations or expansion of existing populations, and are the most important areas in need of protection.

Our Response: Because there was insufficient information for the Secretary to make a determination that unoccupied areas were essential to the conservation of the species, we have only designated areas of known occupancy that are known to contain the PCEs essential to the conservation of the species. We did not include areas of unknown occupancy in the final critical habitat designation because we did not have adequate information for the Secretary to determine that specific unoccupied areas were essential to the bull trout's conservation. We based this designation on the best scientific and commercial information available. Many streams not included in this designation can and will contribute to bull trout recovery, but do not meet the definition of critical habitat. We evaluated comments documenting stream segments that are not essential and where appropriate, refined this final critical habitat rule (See Summary of Changes from the Proposed Rule section below).

(129) *Comment:* The Clackamas River should be designated as critical habitat.

Our Response: The Clackamas River is not designated as critical habitat because the Service determined it is not essential to the conservation of bull trout in the Willamette River Basin Unit. The Willamette Recovery Unit Team recognized the Clackamas River as core habitat and not a core area based on the lack of data documenting bull trout in the Clackamas River. Bull trout are not known to currently inhabit the Clackamas River, but their presence was documented historically, and the Recovery Unit Team believes that the sub-basin has the necessary habitat elements to support the reintroduction of bull trout. Based on limited historical information, it is unknown whether reproducing bull trout populations existed previously in the Clackamas River.

(130) *Comment:* Critical habitat should be designated as it was in the proposed rule because there is no assurance that within the next 10 years or beyond that funding will be available for implementation. Therefore, the state suggested that critical habitat in Oregon should be re-designated as proposed where these directives have been identified as a reason for excluding.

Our Response: We have evaluated the FCRPS, the Northwest Forest Plan and PACFISH/INFISH, as well as other individual Federal and State programs and directives to determine their benefit for exclusion versus the benefit of designating as critical habitat. Many of these plans provide some level of conservation benefit to bull trout and the habitat they are known to currently occupy. The final rule considers the contribution of each individual plan, considers whether the lands meet the definition of critical habitat, and weighs the benefits of inclusion versus the benefits of exclusion when determining the final critical habitat designation.

Summary of Revisions From the Previous Rules

(1) Unoccupied lands were removed from the designation. Under the Act the Secretary of the Interior may only include unoccupied lands if she finds that those lands are essential to the conservation of the species. In the case of the bull trout, and based on the best scientific data available, it was not possible for the Secretary to make such a determination at this time.

(2) A variety of areas were found to not meet the definition of critical habitat and lands were excluded under section 4(b)(2) of the Act (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section below).

(3) Lands that did not contain sufficient PCEs to support at least one of the species essential biological activities were removed. For example, the Clark Fork River between Missoula and Butte was proposed for designation. Upon further review, it was determined that this site is a superfund site subject to contamination by leaching from mine wastes. Another example is the middle fork of the Boise River, also proposed for designation and also subject to leaching of mining wastes. Proposed critical habitat that did not contain sufficient PCEs to support the species was removed, as was critical habitat where the presence of PCEs was speculative. The Act does not provide for designation based on speculative or prospective presence of PCEs.

(4) The proposed critical habitat designation included a number of reaches to increase connectivity between populations. We received multiple comments that some of the barrier removal proposed to accomplish the connectivity could be detrimental to bull trout populations by providing access to competitor species such as lake trout, brook trout, and rainbow trout. We are removing those reaches pending a site by site determination as to which are appropriate for barrier removal. If necessary, additional critical habitat can be designated once those determinations are made.

(5) Segments were designated based on the contributions to bull trout life processes. Some segments contained all PCEs and supported multiple life processes. Some segments contained only a portion of the PCEs necessary to support the bull trout's particular use of that habitat. Where a subset of the PCEs were present (*e.g.*, water temperature during migration flows) it has been noted that only PCEs present at designation will be protected. In addition, some of the PCEs were present only at particular times of year, and not present at others. This led to a concern that by designating the area as critical habitat subsequent biological opinions would assume that the PCEs were constantly present, particularly in areas where active management (such as a dam) was present. Two examples of this are temperature and flows. We have designated some streams where appropriate temperatures occur only at specific times of year which coincide with bull trout use; but at other times the stream temperatures are outside the optimal range or may even be fatal to bull trout. We are concerned that our designation may be misinterpreted to require these temperatures be available year round as a result of the designation, particularly when the stream is controlled by upstream structures. Another example is flows. There are streams which are designated as critical habitat that are dry for portions of the year. These streams are designated because they are used by bull trout during portions of the year when the PCEs are present, perhaps for migration or foraging. Again, the assumption that the PCEs are present during the entire year is not appropriate, and could have serious consequences for other parties. Our goal is to ensure that the PCEs are protected when they are present as a result of federal actions but also to avoid inadvertently requiring creation of PCEs where they do not now occur. As a result, we have determined that explicitly placing current ongoing federal actions that create the PCEs in the baseline for the purposes of section 7 consultations under the Act, will protect existing PCEs and require any changes in those federal actions to undergo consultation in order to determine the effect of the changes on critical habitat.

Public comments in general, and particularly technical comments from local, State, and Federal agencies and Native American Tribes, were very useful in focusing the proposal to those areas with the features most essential to the conservation of the species. We held numerous public hearings and public meetings where we received specific technical comments that prompted further internal critical review of the proposal. The peer review process provided constructive criticism from fisheries scientists regarding our approach to developing the critical habitat proposal, as well as technical comments regarding specific proposed critical habitat areas. Through our working relationships with State and Federal agencies, we also received some new information after the proposal was issued, such as new records of bull trout occurrence, evidence of reproduction in some streams, or the lack of such positive survey results, as well as information on conservation actions underway within States.

We revised the stream miles and lake and reservoir acreages for designated critical habitat for those areas not containing features essential to bull trout conservation, based on information supplied by comments received as well as information gained from field visits to some of the sites.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act means to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but was not known to be occupied at the time of listing will likely but not always be essential to the conservation of the species and, therefore, included in the critical habitat designation.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for

recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that are essential to the conservation of the bull trout. In designating critical habitat, we reviewed the approaches to the conservation of the species undertaken by local, State, and Federal agencies; tribal governments; and private individuals and organizations since the species was listed in 1998. We relied on information collected by the bull trout Recovery Unit Teams, which were comprised of Federal, State, tribal, and private biologists, as well as experts from other scientific disciplines such as hydrology and forestry, resource users, and other stakeholders with an interest in bull trout and the habitats they depend on for survival. We reviewed available information concerning bull trout habitat use and preferences, habitat conditions, threats, limiting factors, population demographics, and the known locations, distribution, and abundances of bull trout. We designated no areas outside the geographical area presently occupied by the species.

During our evaluation of information, we also took into account the relatively low probability of detection of bull trout in traditional fish sampling and survey efforts, as well as the limited extent of such efforts across the range of bull trout. Because of their varied life history strategies, nocturnal habits, and low population densities in many areas, the detectability of bull trout in a given area is highly variable (Rieman and McIntyre 1993). In some areas, adult and subadult bull trout make extensive migrations both within and outside their core areas, which makes surveying difficult. Much of the current information on bull trout presence is the product of informal surveys or sampling conducted for other species or other purposes. The primary limitations of informal surveys are that they provide no estimate of certainty (*i.e.*, a measure of the probability of detection), and that they may be inadequate for determining population parameters such as the densities and distribution of the population. The need for a statistically sound bull trout survey protocol has been addressed only recently through the development, by the American Fisheries Society, of a peer-reviewed protocol for determining presence/absence, and potential habitat suitability for juvenile and resident bull trout (Peterson *et al.* 2002). Consequently, we considered all documented occurrences of bull trout in the past 20 years as evidence of occupancy.

We used information gathered during the bull trout recovery planning process, as supplemented by even more recent information developed by State agencies, tribes, U.S. Forest Service, and other entities, in developing this final critical habitat designation. We used data concerning habitat conditions or status of PCEs when available. To address areas where data gaps exist, we solicited expert opinions from knowledgeable fisheries biologists in the local area.

We also reviewed available information pertaining to the habitat requirements of this species. Important considerations in selecting areas for designated critical habitat include factors specific to each river system, such as size (*e.g.*, stream order), gradient, channel morphology, connectivity to other aquatic habitats, and habitat complexity and diversity, as well as rangewide recovery considerations. We took into account that preferred habitat for bull trout ranges from small headwater streams used largely for spawning and rearing, to downstream mainstem portions of river networks used for rearing and FMO habitat.

Our methods included consideration of information regarding habitat essential to maintaining the migratory life history forms of bull trout, in light of the repeated emphasis about the importance of such habitat in the scientific literature (Rieman and McIntryre 1993; Hard 1995; Healey and Prince 1995; Rieman *et al.* 1995; Montana Bull Trout Scientific Group (MBTSG) 1998; Dunham and Rieman 1999; Nelson *et al.* 2002). Material reviewed included data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed academic theses and agency reports; and regional GIS overlays. Habitat for movement upstream, downstream and, in some cases, through marine waters is essential for migratory life history forms for spawning, foraging, growth, access to rearing and overwintering areas or thermal refugia (*e.g.*, spring-fed streams in late summer), avoidance of extreme environmental conditions, and other normal behavior. Successful migration requires biologically, physically, and chemically unobstructed routes for movement of individuals. Therefore, our methods included considering information regarding habitat that is essential for movement into and out of larger rivers, because of the importance of such areas to the fluvial form of bull trout. We similarly identified habitat essential for movement between streams and lakes by adfluvial forms and habitat essential for movement into and through marine waters by amphidromous forms.

Migratory corridors also are essential for movement between populations (Fraley and Shepard 1989; Rieman and McIntyre 1993; Rieman *et al.* 1995; Dunham and Rieman 1999). Thus, in addition to considering areas important for migration within populations, our method also included considering

information regarding migration corridors necessary to allow genetic exchange between local populations. Corridors that allow such movements can support eventual recolonization of unoccupied areas or otherwise play a significant role in maintaining genetic diversity and metapopulation viability (see the June 25, 2004 proposed rule; 69 FR 35767). Because these factors are important in identifying the features and areas that are essential to bull trout conservation, our method included consideration of the various roles that migratory corridors have for bull trout.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we consider those physical and biological features (PCEs) that are essential to the conservation of the species, and within areas occupied by the species at the time of listing, that may require special management considerations and protection. These include, but are not limited to space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

Pursuant to our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of the bull trout. All areas designated as critical habitat for bull trout are occupied, within the species' historic geographic range, and contain sufficient PCEs to support at least one life history function.

Bull trout exhibit a number of life-history strategies. Stream-resident bull trout complete their entire life cycle in the tributary streams where they spawn and rear. Some bull trout are migratory, spawning in tributary streams where juvenile fish usually rear from 1 to 4 years before migrating to either a larger river (fluvial) or lake (adfluvial) where they spend their adult life, returning to the tributary stream to spawn (Fraley and Shepard 1989). These migratory forms occur in areas where conditions allow for movement from upper watershed spawning streams to larger downstream waters that contain greater foraging opportunities (Dunham and Rieman 1999). Resident and migratory forms may be found together, and either form can produce resident or migratory offspring (Rieman and McIntyre 1993). Bull trout in the Coastal-Puget Sound area are believed to include an anadromous form which migrates to saltwater to mature, returning to streams to spawn (64 FR 58912).

Bull trout are opportunistic feeders, with food habits that primarily are a function of size and life history strategy. Resident and juvenile migratory bull trout prey on terrestrial and aquatic insects, macro-zooplankton, and small fish (Donald and Alger 1993; McPhail and Baxter 1996). Adult migratory bull trout feed almost exclusively on other fish (Rieman and McIntyre 1993).

Bull trout have more specific habitat requirements than most other salmonids (Rieman and McIntyre 1993). Habitat components that particularly influence their distribution and abundance include water temperature, cover, channel form and stability, spawning and rearing substrate conditions, and migratory corridors (Fraley and Shepard 1989; Goetz 1989; Watson and Hillman 1997).

Relatively cold water temperatures are characteristic of bull trout habitat. Water temperatures above 15 °Celsius (C) (59 °Fahrenheit (F)) while not lethal are believed to limit their distribution (Fraley and Shepard 1989; Rieman and McIntyre 1996). Although adults have been observed in large rivers throughout the Columbia River basin in water temperatures up to 20 °C (68 °F), Gamett (1999) documented steady and substantial declines in abundance in stream reaches where water temperature ranged from 15 to 20 °C (59 to 68 °F). Thus, water temperature may partially explain the generally patchy distribution of bull trout in a watershed. In large rivers, bull trout are often observed ''dipping'' into the lower reaches of tributary streams, and it is suspected that cooler waters in these tributary mouths may provide important thermal refugia, allowing them to forage, migrate, and overwinter in waters that would otherwise be, at least seasonally, too warm. Spawning areas often are associated with cold-water springs, groundwater infiltration, and the coldest streams in a given watershed (Pratt 1992; Rieman and McIntyre 1993; Rieman *et al.* 1997).

Throughout their lives, bull trout require complex forms of cover, including large woody debris, undercut banks, boulders, and pools (Fraley and Shepard 1989; Watson and Hillman 1997). Juveniles and adults frequently inhabit side channels, stream margins, and pools with suitable cover (Sexauer and James 1997). McPhail and Baxter (1996) reported that newly emerged fry are secretive and hide in gravel along stream edges and in side channels. They also reported that juveniles are found mainly in pools but also in riffles and runs that they maintain focal sites near the bottom, and that they are strongly associated with instream cover, particularly overhead cover. Bull trout have been observed overwintering in deep beaver ponds or pools containing large woody debris (Jakober 1995). Adult bull trout migrating to spawning areas have been recorded as staying two to four weeks at the mouths of spawning tributaries in deeper holes or near log or cover debris (Fraley and Shepard (1989)).

The stability of stream channels and stream flows are important habitat characteristics for bull trout populations (Rieman and McIntyre 1993). The side channels, stream margins, and pools with suitable cover for bull trout are sensitive to activities that directly or indirectly affect stream channel stability and alter natural flow patterns.

Watson and Hillman (1997) concluded that watersheds must have specific physical characteristics to provide the necessary habitat requirements for bull trout spawning and rearing, and that the characteristics are not necessarily ubiquitous throughout the watersheds in which bull trout occur. The preferred spawning habitat of bull trout consists of low-gradient stream reaches with loose, clean gravel (Fraley and Shepard 1989). Bull trout typically spawn from August to November during periods of decreasing water temperatures (Swanberg 1997). However, migratory forms are known to begin spawning migrations as early as April, and to move upstream as much as 250 km (155 mi) to spawning areas (Fraley and Shepard 1989; Swanberg 1997). Fraley and Shepard (1989) reported that initiation of spawning by bull trout in the Flathead River system appeared to be related largely to water temperature, with spawning initiated when water temperatures dropped below 9–10 °C (48 to 50 °F). Goetz (1989) reported a temperature range from 4 to 10 °C (39 to 50 °F) (Goetz 1989). Such areas often are associated with cold-water springs or groundwater upwelling (Rieman *et al.* 1997; Baxter *et al.* 1999). Fraley and Shepard (1989) also found that groundwater influence and proximity to cover are important factors influencing spawning site selection. They reported that the combination of relatively specific requirements resulted in a restricted spawning distribution in relation to available stream habitat.

Depending on water temperature, egg incubation is normally 100 to 145 days (Pratt 1992). Water temperatures of 1.2 to 5.4 °C (34.2 to 41.7 °F) have been

reported for incubation, with an optimum (best embryo survivorship) temperature reported to be from 2 to 4 °C (36 to 39 °F) (Fraley and Shepard 1989; McPhail and Baxter 1996). Juveniles remain in the substrate after hatching, such that the time from egg deposition to emergence of fry can exceed 200 days. During the relatively long incubation period in the gravel, bull trout eggs are especially vulnerable to fine sediments and water quality degradation (Fraley and Shepard 1989). Increases in fine sediment appear to reduce egg survival and emergence (Pratt 1992). Juveniles are likely similarly affected. High juvenile densities have been reported in areas characterized by a diverse cobble substrate and a low percent of fine sediments (Shepard *et al.* 1984).

The ability to migrate is important to the persistence of local bull trout subpopulations (Rieman and McIntyre 1993; Gilpin 1997; Rieman and Clayton 1997; Rieman *et al.* 1997). Bull trout rely on migratory corridors to move from spawning and rearing habitats to foraging and overwintering habitats and back. Migratory bull trout become much larger than resident fish in the more productive waters of larger streams and lakes, leading to increased reproductive potential (McPhail and Baxter 1996). The use of migratory corridors by bull trout also results in increased dispersion, facilitating gene flow among local populations when individuals from different local populations interbreed, stray, or return to nonnatal streams. Also, local populations that have been extirpated by catastrophic events may become reestablished as a result of movements by bull trout through migratory corridors (Rieman and McIntyre 1993, Montana Bull Trout Scientific Group (MBTSG) 1998).

While stream habitats have received more attention, lakes and reservoirs also figure prominently in meeting the life cycle requirements of bull trout. For adfluvial bull trout populations, lakes and reservoirs provide an important component of the core foraging, migrating, and overwintering habitat, and are integral to maintaining the adfluvial life history strategy that is commonly exhibited by bull trout. When juvenile bull trout emigrate downstream to a lake or reservoir from the spawning and rearing streams in the headwaters, they enter a more productive lentic environment that allows them to achieve rapid growth and energy storage. Typically, juvenile bull trout are at least two years old and 100 mm (4 inches) or longer upon entry to the lake environment. For the next 2–4 years they grow rapidly. At a typical age of five years or older, when total length normally exceeds 400 mm (16 inches), they reach sexual maturity. The lake environment provides the necessary attributes of food, space, and shelter for the subadult fish to prepare for the rigors of migratory passage upstream to the natal spawning area, a migration that may last as long as six months and cover distances as much as 250 km (155 mi) upriver.

In comparison to streams, lake and reservoir environments are relatively more secure from catastrophic natural events. They provide a sanctuary for bull trout, allowing them to quickly rebound from temporary adverse conditions in the spawning and rearing habitat. For example, if a major wildfire burns a drainage and eliminates most or all aquatic life (a rare occurrence), bull trout subadults and adults that survive in the lake may return the following year to repopulate the system. In this way, lakes and reservoirs provide an important adaptive element of the adfluvial life history strategy.

The construction of reservoirs may have had adverse effects to bull trout, but some reservoirs also have provided benefits. For example, the basin of Hungry Horse Reservoir has functioned adequately for fifty years as a surrogate home for stranded Flathead Lake bull trout trapped upstream of the dam when it was completed. While this is an artificial impoundment, the habitat the reservoir provides and the presence of an enhanced prey base of native minnows, suckers, and whitefish within the reservoir sustain a large adfluvial bull trout population. Additionally, while barriers to migration are often viewed as a negative consequence of dams, the connectivity barrier at Hungry Horse Dam has also served an important, albeit unintended, function in restricting the proliferation of nonnative *Salvelinus* species (brook trout and lake trout) from downstream areas upstream above the dam. Additional information related to bull trout biology can be found in our administrative record.

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the bull trout's PCEs are:

(1) Water temperatures that support bull trout use. Bull trout have been documented in streams with temperatures from 32 to 72 °F (0 to 22 °C) but are found more frequently in temperatures ranging from 36 to 59 °F (2 to 15 °C). These temperature ranges may vary depending on bull trout life history stage and form, geography, elevation, diurnal and seasonal variation, shade, such as that provided by riparian habitat, and local groundwater influence. Stream reaches with temperatures that preclude any bull trout use are specifically excluded from designation;

(2) Complex stream channels with features such as woody debris, side channels, pools, and undercut banks to provide a variety of depths, velocities, and instream structures;

(3) Substrates of sufficient amount, size, and composition to ensure success of egg and embryo overwinter survival, fry emergence, and young-of-the-year and juvenile survival. This should include a minimal amount of fine substrate less than 0.25 inch (0.63 centimeter) in diameter.

(4) A natural hydrograph, including peak, high, low, and base flows within historic ranges or, if regulated, currently operate under a biological opinion that addresses bull trout, or a hydrograph that demonstrates the ability to support bull trout populations by minimizing daily and day-to-day fluctuations and minimizing departures from the natural cycle of flow levels corresponding with seasonal variation;

(5) Springs, seeps, groundwater sources, and subsurface water to contribute to water quality and quantity as a cold water source;

(6) Migratory corridors with minimal physical, biological, or water quality impediments between spawning, rearing, overwintering, and foraging habitats, including intermittent or seasonal barriers induced by high water temperatures or low flows;

(7) An abundant food base including terrestrial organisms of riparian origin, aquatic macroinvertebrates, and forage fish;

(8) Permanent water of sufficient quantity and quality such that normal reproduction, growth, and survival are not inhibited.

This designation protects PCEs necessary to support the life history functions which were the basis for the designation. Because not all life history functions require all the PCEs, not all habitat will contain all the PCEs.

Each of the areas designated in this rule have been determined to contain sufficient PCEs to provide for one or more of the life history functions of the bull trout. In some cases, the PCEs exist as a result of ongoing federal actions. As a result, ongoing federal actions at the time of designation will be included in the baseline in any consultation conducted subsequent to this designation.

Criteria Used To Identify Critical Habitat

We are designating critical habitat on lands that we have determined are occupied at the time of listing and contain sufficient primary constituent elements to support life history functions essential for the conservation of the species. We reevaluated the proposed designations based on public comment, peer review of the proposed rules and the draft Recovery Plans, the economic analyses of the proposed rules, and the public comments on those analyses, and other available information, to ensure that the designation accurately reflects habitat with the PCEs that is essential to the conservation of the species.

This critical habitat designation focuses primarily on the maintenance of populations by (1) protecting sufficient amounts of spawning and rearing habitat in upper watershed areas; (2) providing suitable habitat conditions in downstream rivers and lakes to provide foraging and overwintering habitat for fluvial and adfluvial fish; and (3) maintaining migratory routes and the potential for gene flow between populations by maintaining habitat conditions that allow for fish passage.

To be included as critical habitat, a critical habitat unit (CHU) had to be occupied by the species and contain sufficient PCEs to provide for one or more of the following three functions: (1) Spawning, rearing, foraging, or overwintering habitat to support existing bull trout local populations; (2) movement corridors necessary for maintaining migratory life-history forms; and/or (3) suitable occupied habitat that is essential for recovering the species.

A brief discussion of each area designated as critical habitat is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of these areas is contained in our administrative record for this rulemaking.

Non-Inclusions Under Section 4(a)(3)

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan (INRMP). An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes an assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management, fish and wildlife habitat enhancement or modification, wetland protection, enhancement, and restoration where necessary to support fish and wildlife and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the ESA to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the ESA (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with listed species. INRMPs developed by military installations located within the range of critical habitat designated for the Columbia and Coastal-Puget Sound populations of bull trout were analyzed for non-inclusion under the authority of 4(a)(3) of the Act.

The Bayview Acoustic Research Detachment (ARD) Naval Surface Warfare Center, Bayview, ID, has an approved INRMP. This property includes approximately 22 ac (9 ha) of developed land on the shore of Lake Pend Oreille and 16 ac (7 ha) of lake area. There are no tributary streams within this area utilized by bull trout for spawning or early life rearing, but the lake area does contain important FMO habitat for bull trout.

Designating critical habitat on Bayview ARD could impact their role in supporting ongoing U.S. Navy research, development, test, and evaluation programs in underwater acoustics. These efforts include the use of large scale models to simulate the characteristics of current and future Navy submarines in order to develop and evaluate advances in submarine silencing technology. Performing acoustic testing on large scale models provides the same accuracy as testing on actual submarines at a significantly lower cost. Bayview ARD is the only Navy facility capable of testing large scale models for hull-induced flow noise and propulsor noise, and the knowledge gained from these tests are directly applied to reducing the detectability of Navy submarines (Department of the Navy 2003). Bayview ARD's INRMP outlines protection and management strategies for natural resources on the center, including fish species and their habitats.

The plan benefits bull trout through the protection of kokanee salmon spawning habitat, a primary food source for bull trout. The ARD Bayview property in Scenic Bay hosts from 40–70 percent of the kokanee spawning activity in Lake Pend Oreille, depending on the year. The INRMP includes measures to minimize impacts to kokanee habitat by limiting facility boat traffic during spawning periods (November-December), and implementing sediment control measures. Furthermore, interpretive signs have been placed throughout the property to educate employees and the public regarding various aspects of the regions natural resources, threatened or endangered species (including bull trout), and geological history. The INRMP requires the natural resource manager to provide an all hands ARD INRMP awareness training to facilitate INRMP implementation.

Eurasian watermilfoil was identified in the northern part of Lake Pend Oreille during the winter of 2002. Following identification and mapping of invasive species at ARD Bayview, a plan will be developed under the INRMP to control invasive species at the facility and to limit their spread to adjacent lands. Eurasian watermilfoil chokes waterways and near shore environments used by bull trout and their prey species.

Based on the above considerations, and consistent with the direction provided in section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the final INRMP will provide benefits to the bull trout occurring in the lake area within or adjacent to the Bayview ARD. Approximately 16 ac (7 ha) of essential habitat is not included in this critical habitat designation. Therefore, we are not including critical habitat for bull trout on this installation pursuant to section 4(a)(3) of the Act.

The Naval Radio Station Jim Creek, Naval Station Everett, Naval Air Station Whidbey Island, and the Army's Fort Lewis Installation (Fort Lewis) are all located in western Washington and all have approved INRMPs. We have

examined the INRMPs for these military installations to determine coverage for the bull trout. The Naval Radio Station Jim Creek INRMP provides for (1) restoration of riparian buffers along Jim Creek, (2) protection to Jim Creek from erosion and sedimentation, and (3) protection to Jim Creek from contaminants and herbicides. The Naval Station Everett's INRMP benefits bull trout by providing (1) protection to bull trout in the marine environment from oil spills around the berthing naval vessels, (2) bioswales to prevent the release of toxins, contaminants and oils from reaching the water column through storm drains, and (3) the restoration of riparian habitat on Navy lands located along the Middle Fork Quilceda Creek. Naval Aviation Station Whidbey Island's INRMP benefits bull trout through (1) monitoring and managing livestock grazing, (2) managing road building and maintenance to prevent erosion and sedimentation of bull trout habitat, (3) assuring proper disposal of hazardous materials, and (4) implementation of the Integrated Pest Management plan's best management practices to protect aquatic environments. The INRMP for the U.S. Army, Fort Lewis, benefits bull trout through (1) the protection and enhancement of wetlands, which include marshes, lakes, rivers and streams; all wetlands are protected with 300 foot-wide riparian buffers to maintain cold water temperatures, prevent sediment from entering the streams and provide for woody debris, (2) control of invasive plant species which often diminishes water quality and impacts native plants and animals, and (3) restoring salmon spawning habitat and access to increase salmon productivity which contributes to and enhances the bull trout prey base. In addition, the Navy conducts essential training and testing within the marine waters of Crescent Harbor and Dabob Bay. These activities are conducted in open marine waters not controlled by the military, and are not included in adjacent military INRMPs. However, because these training and testing activities are essential for national security, they have been excluded from the final designation of critical habitat under section 4(b)(2) of the Act.

These military installations with INRMPs do not have streams that are utilized by bull trout for spawning and rearing. The Naval Radio Station Jim Creek occurs in the Jim Creek watershed. The lower reaches of Jim Creek provide foraging habitat for subadult and adult bull trout. The Naval Station Everett and Naval Air Station Whidbey Island property includes land on or near the shores of Puget Sound that contains important foraging and migration habitat for amphidromous bull trout. Fort Lewis borders the Nisqually River and Puget Sound where the mainstem Nisqually River and Puget Sound nearshore bordering this property contain important foraging and migration habitat for amphidromous bull trout.

Habitat features essential to bull trout conservation exists within or immediately adjacent to these military installations. Designating critical habitat on these military installations may impact their role in supporting ongoing military exercises and operations that occur at these locations. These military installations all have approved INRMPs, and activities occurring on these properties are currently being conducted in a manner that minimizes impacts to bull trout habitat. In addition, these installations already consult with us on their actions (including those occurring in the open water training and testing areas) that may have adverse affects to bull trout and their habitat under section 7 requirements.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the INRMPs will provide benefits to the bull trout occurring in streams within or adjacent to Naval Radio Station Jim Creek, Naval Air Station Whidbey Island, and Fort Lewis. Approximately 25 mi (40 km) of essential habitat is not included in this critical habitat designation. Therefore, we are not including critical habitat for bull trout on these installations pursuant to section 4(a)(3) of the Act.

Section 3(5)(A) and Exclusions Under Section 4(b)(2)

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (i) essential to the conservation of the species, and (ii) which may require special management considerations or protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential to the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that require no special management or protection also are not, by definition, critical habitat.

There are multiple ways to provide management for species habitat. Statutory and regulatory frameworks that exist at a local level can provide such protection and management, as can lack of pressure for change, such as areas too remote for anthropogenic disturbance. Finally, State, local, or private management plans as well as management under Federal agencies jurisdictions can provide protection and management to avoid the need for designation of critical habitat. When we consider a plan to determine its adequacy in protecting habitat, we consider whether the plan, as a whole will provide the same level of protection that designation of critical habitat would provide. The plan need not lead to exactly the same result as a designation in every individual application, as long as the protection it provides is equivalent, overall. In making this determination, we examine whether the plan provides management, protection, or enhancement of the PCEs that is at least equivalent to that provided by a critical habitat designation, and whether there is a reasonable expectation that the management, protection, or enhancement actions will continue into the foreseeable future. Each review is particular to the species and the plan, and some plans may be adequate for some species and inadequate for others.

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the Secretary is afforded broad discretion and the Congressional record is clear that in making a determination under the section the Secretary has discretion as to which factors and how much weight will be given to any factor.

Under section 4(b)(2), in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, then we must determine

whether excluding the area would result in the extinction of the species. In the following sections, we address a number of general issues that are relevant to the exclusions we considered.

Relationship Between Adverse Modification and Jeopardy in Bull Trout and Bull Trout Critical Habitat Consultations

In *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*, the Ninth Circuit held that the Service's regulatory definition of ''destruction or adverse modification'' was contrary to the ESA because it required an affect on the survival of the species, in addition to an effect on recovery. In response, on December 9, 2004, the Acting Director of the Service issued guidance on conducting section 7 consultations with respect to critical habitat until a new regulatory definition could be put in place. The analytical framework presented in this memo directs us to consider whether, with implementation of the proposed action, critical habitat would remain functional to serve the intended conservation role for the species.

Although *Gifford Pinchot* provides guidance regarding the interpretation of the statutory phrase ''destruction or adverse modification,'' it does not directly speak to the meaning of ''jeopardy.'' In order to determine the benefits of including or excluding an area as critical habitat, we must consider the application of both of these terms, and how they will be affect the outcomes of future section 7 consultations regarding bull trout.

In its jeopardy determinations under bull trout Section 7 consultations, the Service uses an analytical framework that relies heavily on the importance of core area populations to the survival and recovery of the bull trout. This has been the case for all jeopardy consultations on the bull trout. These analyses have focused not only on the core area populations but also on the habitat conditions necessary to support them; they have addressed the survival and recovery needs of the bull trout in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted. This approach is predicated on the Service's regulatory definitions of ''harm'' and ''take'' which explicitly require a consideration of an agency action's effects on habitat, whether or not it is designated as critical.

Subsequent to the 9th circuit's decision in *Gifford Pinchot* the Service has conducted both a jeopardy and adverse modification analysis for consultations involving critical habitat. In conducting the adverse modification analysis, the Service has applied the analytical framework described in the Director's December 9, 2004, memorandum. The ultimate question in this analysis is whether, with implementation of the proposed Federal action, the primary constituent elements of affected critical habitat would remain functional to serve the intended conservation role for the bull trout. Generally, the conservation role of bull trout critical habitat units is to support viable core area populations, as a result, adverse modification to that habitat would result in both a jeopardy determination or an adverse modification determination. This leads to the conclusion, in the particular case of bull trout that very few examples of adverse modification can occur without also triggering a jeopardy finding.

Some consultations (14 informals, 8 formals) on bull trout critical habitat have been conducted in the 9 months since the original designation. These consultations have not resulted in outcomes for Federal action agencies different than those that would have resulted in consultations purely under the jeopardy standard. As stated earlier, this result is due in particular to the manner in which the Service conducts jeopardy analyses for the bull trout (by focusing on protection of core area populations and their habitats, without making a distinction between effects on survival versus recovery. The approach is consistent with the *Gifford Pinchot* court's guidance with respect to adverse modification, because it is based on a standard that gauges the action's effect on conservation rather than survival which is consistent with the court's direction that the Agency go beyond merely a requirement that the Federal action cause an effect on bull trout survival in order to constitute adverse modification.

We also note that in the 200 or so formal consultations completed since the bull trout was listed, most of the anticipated effects of proposed Federal actions on the species have not been biologically significant from a core-area perspective, and if these actions had been subject to the adverse modification standard described above, they would not likely have violated it. Based on our analysis of 137 formal consultations conducted during the period 1998–2003, the following types of projects were proposed in bull trout-occupied habitat, in order of frequency (most to least): Multiple project actions, grazing, road work, bridge work, habitat restoration, land and resource management plans, mining, hydropower, timber harvest, recreation, water diversion/irrigation, research, land exchange, flood control, erosion control, pipeline construction, predator control, landslide remediation, instream crossings, weed management, dredging, and levee repair.

However, at least one major Federal action involving significant modifications to natural flow patterns in designated critical habitat is currently in formal consultation, and it is likely (based on recent litigation patterns and outcomes) that the number of diversion-related Federal actions consulted on, some of which may occur in critical habitat, will increase in the future. Water quality and quantity are significant factors (and primary constituent elements) influencing the viability of bull trout core areas. Given that context, it seems reasonable to predict that a few Federal actions will be found to adversely modify bull trout critical habitat; most of these actions would probably also constitute jeopardy.

This analysis would be different in the case of critical habitat designated in unoccupied areas or if currently occupied areas subsequently become unoccupied. In such cases, different outcomes/requirements of consultation on critical habitat are much more likely. In the first case, designated unoccupied habitat, there would not necessarily be a requirement for a Section 7 consultation in the absence of a critical habitat designation. This is consistent with the 9th Circuit's decision in *Defenders of Wildlife* v. *Flowers et al. 2005*, 414 F.3d 1066 (2005), which upheld a ''no effect'' determination by the U.S. Army Corps of Engineers in circumstances in which ''no pygmy-owls had been found to live within either project area. This designation only designates critical habitat in areas we have defined to be occupied, and so the benefits attributable to unoccupied habitat designation will not accrue. The second situation identified, whereby current populations disappear, theoretically provides a similar benefit. However, as a practical matter, it is unlikely that such a benefit would accrue in the foreseeable future as this rule defines occupied habitat as habitat that has documented occupancy within the past 20 years (see the previous discussion for the basis of the definition). Based on the FWS definition of occupied habitat, it would be at least

20 years until the protections of a jeopardy consultation, with its appurtenant habitat considerations, were removed. Accordingly, we do have a basis for believing that in the particular case of this bull trout critical habitat, designation in the particular case of the bull trout would not result in significantly different protections to the species.

Benefits of Designating Critical Habitat in the Absence of Other Conservation Efforts

The designation of critical habitat provides some benefits all the time and may in certain circumstances provide conservation benefits that would not otherwise be provided. We have identified three types of possible benefits. First, there are educational benefits. Second, there are circumstances where additional protections under other regulatory mechanisms are triggered by a designation. For example PACFISH/INFISH has particular protections triggered by a designation and some states have regulatory regimes that employ the existence of designated critical habitat as a trigger for protection. Third, in the instance that a future Federal action would be likely to adversely modify critical habitat but not likely to jeopardize the continued existence of the species, the designation would provide a benefit.

The benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for bull trout. In general the educational benefit of a critical habitat designation always exists although in some cases it may be redundant with other educational effects (for example habitat conservation plans have significant public input and may largely duplicate the educational benefit of a critical habitat designation). This benefit is closely related to a second, more indirect benefit; in that designation of critical habitat would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances, such as the Washington State Growth Management Act or Washington State Shoreline Management Act which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas based on the best available science. Designating critical habitat could lead to additional State or local restrictions for the landowner, on top of conservation measures already in place. The benefit could accrue as a result of an automatic ''triggering'' based on existing law, or through specific, subsequent actions designed to protect the species. However, to the extent that local and state governments wish to provide additional protection for listed species' habitats, there are numerous alternative approaches to achieve that end. For example, recovery plans or proposed critical habitat can form the basis for such additional protections. State and local agencies have independent authority to adopt such protections and do not require Federal authorization or direction to do so. Because of that, we view this benefit as indirect as it is not required to achieve the additional protection.

The most direct, and potentially largest regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to unsure those areas that contain the physical and biological features essential to the conservation of the species or unoccupied areas that are essential to the conservation are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery. When consultation does take place, the analysis of whether the Federal action destroys or adversely modifies critical habitat makes a determination regarding the effect of the action on the species conservation, consistent with the holding of *Gifford Pinchot*, discussed above. It is important to note that even though, consistent with *Gifford Pinchot*, the prohibition on adverse modification can be triggered without a showing of an effect on survival (in other words, a negative effect on the conservation of the species can trigger the prohibition), designation of critical habitat does not require actions to recover the species beyond what may be necessary to address potential adverse modification impacts on critical habitat that supports recovery. There are tools (*e.g.*, HCPs) that can encourage or require habitat restoration or improvement and other positive steps to help move species closer to being recovered.

Another significant limitation on the benefits of designating critical habitat is the fact that as long as the area in question is occupied, consultation would in any case be required to ensure that the action was not likely to jeopardize the species. The areas that were proposed for designation are all currently occupied by bull trout. Therefore, designation of these areas could have a substantive regulatory effect in two circumstances: (1) The Service consults on a future Federal action, does both jeopardy and adverse modification analyses, and concludes that the action would likely adversely modify critical habitat but not jeopardize the species, or (2) the range of the bull trout contracts prior consultation, such that the area is no longer subject to jeopardy consultation, but the action would be likely to adversely modify critical habitat.

Regarding the first of these circumstances, and in a discussion specific to bull trout, as discussed above, in analyzing whether Federal actions might jeopardize the continued existence of the bull trout, the Service has focused on the viability of core area populations, without making distinctions between what is necessary for survival versus recovery. Because with respect to the bull trout the Service views the conservation role of critical habitat units as supporting viable core area populations, the Service anticipates that few Federal actions (but not necessarily none) would adversely modify critical habitat but not jeopardize the species.

Regarding the second of these circumstances, for each exclusion, the Service considered the possibility of local bull trout extirpation in the affected stream reaches given the data available. In general, the Service does not anticipate significant extirpations in the areas excluded, although such an event cannot be completely ruled as stochastic events such as a conflagration have in the past completely destroyed populations. If such an event was to occur, and an entire population was extirpated, the designation of critical habitat could provide important protection to the habitat to preserve it for eventual recolonization or reintroduction. However, as noted earlier, as a practical matter, the Service would consider the habitat occupied for 20 years subsequent to the temporal extirpation, providing ample opportunity for restoration of the population.

Notwithstanding the limitations discussed above, in those instances in

which the jeopardy prohibition and other applicable protections would not adequately conserve bull trout habitat from the effects of Federal actions, designation of critical habitat could help ensure the integrity of bull trout habitat is maintained. For example, if a federally funded road project was proposed to go across lands that were designated as critical habitat, a consultation would need to be conducted to ensure the designated critical habitat was not destroyed or adversely modified to the point of appreciably diminishing its habitat features essential to bull trout recovery. The designation could therefore result in modifications to the Federal project to protect bull trout habitat.

To the extent that designation results in changes to actions that have a negative effect on bull trout habitat, minimizing or mitigating that effect, or results in additional actions to benefit bull trout habitat (*e.g.*, as a result of disseminating information), designation could benefit bull trout conservation. If the designation provided additional conservation, it could have direct benefits, such as those typically captured in an economic analysis which include, increased tourism or recreational activity. In addition, there could be intangible benefits that accrue to society in general and individuals in direct proportion to the value that society and individuals place on such intrinsic values as existence values and environmental goods.

Conservation Partnerships on Non-Federal Lands

Most federally listed species in the United States will not recover without the cooperation of non-federal landowners. More than 60% of the United States is privately owned (National Wilderness Institute 1995) and at least 80% of endangered or threatened occur either partially or solely on private lands (Crouse *et al.* 2002). Stein *et al.* (1995) found that only about 12% of listed species were found almost exclusively on Federal lands (*i.e.*, 90–100% of their known occurrences restricted to Federal lands) and that 50% of federally listed species are not known to occur on Federal lands at all.

Given the distribution of listed species with respect to land ownership, conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities and the voluntary cooperation of many non-federal landowners (Wilcove and Chen 1998, Crouse *et al.* 2002, James 2002). Building partnerships and promoting voluntary cooperation of landowners is essential to understanding the status of species on non-federal lands and is necessary to implement recovery actions such as reintroducing listed species, habitat restoration, and habitat protection.

Many non-Federal landowners derive satisfaction in contributing to endangered species recovery. The Service promotes these private-sector efforts through the Four Cs philosophy—conservation through communication, consultation, and cooperation. This philosophy is evident in Service programs such as HCPs, Safe Harbors, CCAs, CCAAs, and conservation challenge cost-share. Many private landowners, however, are wary of the possible consequences of encouraging endangered species to their property, and there is mounting evidence that some regulatory actions by the Federal government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on private lands (Wilcove *et al.* 1996, Bean 2002, Conner and Mathews 2002, James 2002, Koch 2002, Brook *et al.* 2003). Many landowners fear a decline in their property value due to real or perceived restrictions on land-use options where threatened or endangered species are found. Consequently, harboring endangered species is viewed by many landowners as a liability, resulting in anti-conservation incentives because maintaining habitats that harbor endangered species represents a risk to future economic opportunities (Main *et al.* 1999, Brook *et al.* 2003).

The purpose of designating critical habitat is to contribute to the conservation of threatened and endangered species and the ecosystems upon which they depend. The outcome of the designation, triggering regulatory requirements for actions funded, authorized, or carried out by Federal agencies under section 7 of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions (Main *et al.* 1999, Bean 2002, Brook *et al.* 2003). The magnitude of this negative outcome is greatly amplified in situations where active management measures (*e.g.*, reintroduction, fire management, control of invasive species) are necessary for species conservation (Bean 2002).

The Service believes that the judicious use of excluding specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone. For example, less than 17% of Hawaii is federally owned, but the state is home to more than 24% of all federally listed species, most of which will not recover without State and private landowner cooperation. On the island of Lanai, Castle and Cooke Resorts, LLC, which owns 99% of the island, entered into a conservation agreement with the Service. The conservation agreement provides conservation benefits to target species through management actions that remove threats (*e.g.* axis deer, mouflon sheep, rats, invasive nonnative plants) from the Lanaihale and East Lanai Regions. Specific management actions include fire control measures, nursery propagation of native flora (including the target species) and planting of such flora. These actions will significantly improve the habitat for all currently occurring species. Due to the low likelihood of a Federal nexus on the island we believe that the benefits of excluding the lands covered by the MOA exceeded the benefits of including them. As stated in the final critical habitat rule for endangered plants on the Island of Lanai:

> On Lanai, simply preventing ''harmful activities'' will not slow the extinction of listed plant species. Where consistent with the discretion provided by the Act, the Service believes it is necessary to implement policies that provide positive incentives to private landowners to voluntarily conserve natural resources and that remove or reduce disincentives to conservation. While the impact of providing these incentives may be modest in economic terms, they can be significant in terms of conservation benefits that can stem from the cooperation of the landowner. The continued participation of Castle and Cooke Resorts, LLC, in the existing Lanai Forest and Watershed Partnership and other voluntary conservation agreements will greatly enhance the Service's ability to further the recovery of these endangered plants.

Secretary Norton's Four Cs philosophy—conservation through communication, consultation, and cooperation—is the foundation for developing the tools of conservation. These tools include conservation grants, funding for Partners for Fish and Wildlife Program, the Coastal Program, and cooperative-conservation challenge cost-share grants. Our Private Stewardship Grant program and Landowner Incentive Program provide assistance to private land owners in their voluntary efforts to protect threatened, imperiled, and endangered

species, including the development and implementation of HCPs.

Conservation agreements with non-Federal landowners (*e.g.*, Habitat Conservation Plans (HCPs), contractual conservation agreements, easements, and stakeholder-negotiated State regulations) enhance species conservation by extending species protections beyond those available through section 7 consultations. In the past decade we have encouraged non-Federal landowners to enter into conservation agreements, based on a view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through coercive methods (61 FR 63854; December 2, 1996).

Conservation Efforts for Aquatic Systems in the Pacific Northwest

As discussed below, much of the area that contains the physical and biological features essential for the conservation of bull trout have not been included within this final critical habitat designation. In large part, this is a result of existing management and conservation regimes that apply to watersheds in the Pacific Northwest. These and other state and local conservation planning efforts provide an exceptional level of cooperative conservation for bull trout and other salmonids.

Analysis of Particular Plans and Areas Under Sections 3(5)(A) and 4(b)(2) (For a complete documentation of our 3(5)(a) comparison of the protections of a critical habitat designation and the provisions of the management plans, please refer to the administrative record. For a complete documentation of our and 4(b)(2) analyses, please refer to our supporting document.)

Nisqually National Wildlife Refuge

The Comprehensive Conservation Plan (CCP) for the Nisqually National Wildlife Refuge (Refuge) was finalized in August 2004 and the ROD was signed on November 1, 2004. The Refuge encompasses the lower Nisqually River and delta, one of the few undeveloped large estuaries remaining within Puget Sound in Washington, and provides important FMO habitat for amphidromous bull trout. The CCP will guide management of Refuge operations, habitat restoration, and visitor services for the next 15 years. The preferred alternative maximizes estuarine restoration by increasing the current amount of FMO habitat for amphidromous bull trout in south Puget Sound, while still providing freshwater wetlands and riparian habitat on the Refuge. Restoration of the estuary is expected to result in increased primary production and thus increased food availability for nearly all fish species which depend upon estuarine and shallow marine habitats for survival, including prey fish species preferred by bull trout. We believe the CCP provides the appropriate special management required for the conservation of bull trout PCEs in this area and is, therefore, not appropriate for designating as critical habitat.

Tribal Lands

The longstanding and distinctive relationship between Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

We identified tribal lands within proposed critical habitat where there was a tribal management or conservation plan, or the commitment to establish such a plan, that provided benefits to bull trout and considered whether or not to exclude these lands from critical habitat under subsection 4(b)(2) of the Act. Tribal lands meeting these criteria are: Confederated Tribes of Warm Springs (CTWS) in the Columbia River population; Blackfeet Nation in the Saint Mary/Belly River population; and Swinomish Tribe, Quinault Indian Nation, Muckleshoot Tribe, Jamestown S'Klallam Tribe, Hoh Tribe, and Skokomish Tribe Reservations and tribal lands within the Puget Sound-Coastal population. These tribes have played a significant role in the development of HCPs, local watershed plans, other habitat plans, or have conducted numerous habitat restoration and research projects designed to protect or improve habitat for listed species.

The CTWS has a long history of carrying out proactive conservation actions on their lands. Our dialog with CTWS has led us to believe that their resource management strategy is largely compatible with bull trout conservation. The CTWS have cooperated with Federal and State agencies, and private organizations to implement voluntary proactive conservation activities on their lands that have resulted in tangible conservation benefits for bull trout. We expect this cooperation, and the fruit that it bears (*i.e.*, bull trout conservation), to continue.

The Blackfeet Nation has demonstrated a commitment to conservation, protection, and enhancement of the fishery resource on the Blackfeet Reservation. The tribe has supported and participated in Service studies to gather data for assessing effects of the Milk River Irrigation System on bull trout within the Saint Mary River drainage. They have changed angling regulations on their reservation to maximize bull trout protection since the species was listed. The tribe has also participated in the bull trout recovery planning process and has recently made a commitment to complete a tribal bull trout management plan (W.A. Talks About, Blackfeet Tribal Business Council, in litt. 2005).

The Swinomish Tribe has a management plan that addresses surface water resources of the Swinomish Reservation, including marine tidelands, an artificial marine channel, estuarine wetlands, small streams, and freshwater wetlands. The management plan is based on existing knowledge and ongoing studies, active conservation practices, ordinances, and current management plans. It will be updated with new information obtained from ongoing surveys, habitat assessments, and other planning processes. The plan consists of regulation and implementation of updated tribal laws to protect habitat, control development, reduce pollution within the boundaries of the Reservation, restore habitat and remove fish passage barriers to contribute proactively to species recovery.

The Quinault Indian Nation and the Bureau of Indian Affairs (BIA) recently developed a forest management plan (FMP) for the entire Quinault Indian Reservation. The FMP covers all forestland (about 173,000 ac (70,011 ha)) under tribal and BIA timber management, including individual Indian-owned trust and tribally owned land. Included in the area of the FMP are the lower Quinault River, the tributaries of the lower Quinault River, the lower Queets River, the Salmon River (including the Middle and South Fork Salmon Rivers), portions of the Raft River, and portions of the Moclips River. The FMP is a 10-year plan covering the period from October 2002 through September 2012. The FMP is being implemented by the Quinault Department of Natural Resources and the BIA Taholah Field Office. Although some adverse effects to the bull trout are expected during implementation of the

plan, it is expected to provide for bull trout conservation needs.

The Skokomish Tribe has provided aquatic resource protection and restoration through a number of collaborative efforts on their reservation and other trust lands. The tribe has been working regularly with landowners, local governments, and others to implement and fund voluntary efforts that provide conservation benefits to salmonids, including bull trout. These cooperative efforts include a variety of investigative assessments, restoration and enhancement projects, property acquisitions, and floodplain/river reach analysis.

The Muckleshoot Tribe has demonstrated a commitment to conservation, protection, and enhancement of fish resources both on and off the Muckleshoot Reservation. For example, the tribe has designated all areas of the White River within its reservation, from ''bluff to bluff,'' as a conservation zone. The tribe has also been a leading participant in gathering data for Lake Washington and preparing a Lake Washington Recovery Plan.

The Jamestown S'Klallam Tribe has a record and reputation as a participant and leader in the planning and implementation of salmonid habitat protection and restoration efforts. The tribe is dedicated to coordinating with NOAA Fisheries, the Service, and with the State of Washington in the spirit of co-management, and is also involved in active consultation and in multiple programs to protect listed salmonid species.

The Hoh Tribe has an FMP that demonstrates a commitment to protect bull trout habitat on or adjacent to its reservation. This forestry plan designates major portions of the floodplain and riparian zones adjacent to streams on the current reservation landscape for conservancy, and is filed with the BIA.

(1) Benefits of Inclusion

The principal benefit of any designated critical habitat is that Federal activities will require section 7 consultations to ensure that adequate protection is provided to avoid adverse modification or destruction of critical habitat. This would provide an additional benefit beyond that provided under the jeopardy standard. In evaluating project effects on critical habitat, the Service must be satisfied that the primary constituent elements (PCEs) of the critical habitat likely will not be altered or destroyed by proposed activities to the extent that the conservation of the affected species would be appreciably reduced. If critical habitat were designated in areas of unoccupied habitat or currently occupied areas subsequently become unoccupied, different outcomes/requirements are also likely since effects to unoccupied areas of critical habitat are not likely to trigger the need for a jeopardy analysis.

In *Sierra Club* v. *Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that critical habitat designation may focus and heighten public awareness of the plight of listed species and their habitats. Designation of critical habitat may contribute to conservation efforts by other parties by delineating areas of high conservation value for the bull trout.

(2) Benefits of Exclusion

The benefits of excluding Indian lands from designation include: (1) The furtherance of established national policies, our Federal trust obligations, and our deference to the tribes in management of natural resources on their lands; (2) the maintenance of effective long-term working relationships to promote the conservation of bull trout; (3) the allowance for continued meaningful collaboration and cooperation in scientific work to learn more about the conservation needs of the species; (4) continued respect for tribal sovereignty over management of natural resources on Indian lands through established tribal natural resource programs; (5) to the extent designation would provide any additional protection of bull trout habitat, costs associated with that protection would be avoided; (6) exclusion would reduce administrative costs of section 7 consultation (as discussed above, these costs are unlikely to lead to additional actual protection for bull trout habitat).

We believe that excluding these tribal lands from critical habitat will help maintain and improve our partnership relationship by recognizing their positive contribution to bull trout conservation. It will also reduce the cost and logistical burden of regulatory oversight. We believe this recognition will provide other landowners with a positive incentive to undertake voluntary conservation activities on their lands, especially where there is no regulatory requirement to implement such actions.

Tribal cooperation and support is required to prevent extinction and promote the recovery of the bull trout due to the need to implement proactive conservation actions. Future conservation efforts will require the cooperation of these tribes. Exclusion of their lands from this critical habitat designation will help us maintain and improve our partnership with them by formally recognizing the positive contributions these tribes have made to bull trout recovery, and by streamlining or reducing unnecessary regulatory oversight.

These tribes have cooperated with us to implement proactive conservation measures. They have cooperated with Federal and State agencies, and private organizations to implement voluntary conservation activities on their lands that have resulted in tangible conservation benefits.

Where consistent with the discretion provided by the Act, we believe it is necessary to implement policies that provide positive incentives to voluntarily conserve natural resources and remove or reduce disincentives to conservation. Thus, we believe it is essential for the recovery of bull trout to build on continued conservation activities with these tribes, to provide positive incentives implementing voluntary conservation activities, and to respect tribal concerns about incurring incidental regulatory or economic impacts.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

It is possible, although unlikely, that Federal actions will be proposed that would be likely to destroy or adversely modify the habitat proposed as critical within the area governed by the above tribes. If such a project was proposed, due to the specific way in which jeopardy and adverse modification are analyzed for bull trout, discussed in detail above, it would likely also jeopardize the continued existence of the species. Few additional benefits are provided by including these tribal lands in this critical habitat designation beyond what will be achieved through the implementation of the existing tribal management/conservation plans. In addition, we expect that the benefit of informing the public of the importance of this area to bull trout conservation would be slight. Therefore, we assign relatively little weight to the benefits of designating this area as critical habitat.

In contrast, although the benefits of encouraging participation in tribal management plans, and, more broadly, helping to foster cooperative conservation are indirect, enthusiastic

tribal participation and an atmosphere of cooperation are crucial to the long-term effectiveness of the endangered species program. Therefore, we assign great weight to these benefits of exclusion. To the extent that there are regulatory benefits of including, there would be associated costs that could be avoided by excluding the area from designation. However, as we expect the regulatory benefits to be slight, we likewise give little weight to avoidance of those associated costs, as well as the additional transaction costs related to section 7 compliance. Finally, we recognize the importance of the trust and sovereignty of the tribes, and therefore assign great weight to these benefits of exclusion.

Therefore, we have determined that the benefits of inclusion for the tribes mentioned above are small, while the benefits of exclusion are more significant. Therefore, the benefits of exclusion outweigh the benefits of inclusion. Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands, the exclusion will not result in the extinction of the bull trout. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation.

Military Lands

The Navy conducts essential open water training and testing within the marine waters of Crescent Harbor and Dabob Bay, located within Puget Sound on the eastside of Whidbey Island and within the Hood Canal fiord, respectively. These areas encompass important marine nearshore habitat used by amphidromous bull trout for foraging and migration. NUWC Keyport provides state-of-the-art infrastructure and capabilities in the Pacific Northwest that have been essential to the Navy's comprehensive underwater test and evaluation programs for undersea weapons, unmanned undersea vehicles, and related combat systems, as well as to the training of Fleet personnel at the NUWC Keyport facilities. NUWC Keyport testing and training activities to support military readiness requires precision underwater tracking capabilities, underwater range sites that offer diverse environments, and varied water depths to meet their mission of test and evaluation of underwater systems. Because these activities are conducted in open marine waters, they are not included in the military's INRMP. Limitations on access to, the use of, or the enhancement of, the existing capabilities and capacities of these ranges would limit or curtail both testing and mission critical Fleet Support functions performed by NUWC Keyport for undersea warfare. These areas have been defined on NOAA charts for over 50 years and operating areas have been further delineated in recent public environmental documentation. A NEPA analysis for these areas has been conducted within the past 5 years, and includes biological assessments evaluating effects on endangered species, which were reviewed and approved by NOAA-Fisheries and the Service. These biological assessments, and associated environmental assessments, addressed bull trout and interactions with military range operations.

(1) Benefits of Inclusion

Habitat containing features essential to bull trout conservation exists within or immediately adjacent to these military open water training and testing grounds. The primary benefit of designating critical habitat on, or adjacent to, these open water training and testing grounds would result from the requirement under section 7 of the Act that Federal agencies consult with us to ensure that any proposed action authorized, funded, or carried out by a Federal agency would not destroy or adversely modify critical habitat. In addition, the designation can educate the public regarding the potential conservation value of an area. This may contribute to conservation efforts by other parties by delineating areas that have conservation value for the bull trout.

(2) Benefits of Exclusion

Designating critical habitat on these open water training and testing areas may impact their role in supporting ongoing military exercises and operations that occur at these locations. The military activities occurring at these sites are currently being conducted in a manner that minimizes impacts to bull trout habitat. In addition, the Navy already consults with us on their actions occurring in the open water training and testing areas that may have potential impacts to bull trout and their habitat under section 7 requirements.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

Because of the relatively limited benefits arising from the designation of critical habitat, we believe the role played in supporting Navy operations, and the related importance to national security of ensuring their ability to maintain a high level of military readiness, we have determined that the national security benefits of excluding areas within or adjacent to the Crescent Harbor and Dabob Bay open water training and testing areas as critical habitat, outweigh the benefits of including them in the designation. Because these marine waters are occupied by the species, and the Navy has a statutory duty under section 7 to ensure that its activities do not jeopardize the continued existence of the bull trout, we find that the exclusion of these marine waters will not lead to the extinction of the bull trout.

Habitat Conservation Plans

Section 10(a)(1)(B) of the ESA authorizes us to issue to non-Federal entities a permit for the incidental take of endangered and threatened species. This permit allows a non-Federal landowner to proceed with an activity that is legal in all other respects, but that results in the incidental taking of a listed species (*i.e.*, take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). The ESA specifies that an application for an incidental take permit must be accompanied by a conservation plan, and specifies the content of such a plan. The purpose of conservation agreements is to describe and ensure that the effects of the permitted action on covered species are adequately minimized and mitigated, and that the action does not appreciably reduce the survival and recovery of the species.

In our assessment of conservation agreements associated with this final rulemaking the analysis required for these types of exclusions requires careful consideration of the benefits of designation versus the benefits of exclusion to determine whether benefits of exclusion outweigh benefits of designation. The benefits of designation typically arise from additional section 7 protections as well as enhanced public awareness once specific areas are identified as critical habitat. The benefits of exclusion generally relate to relieving regulatory burdens on existing conservation partners, maintaining good working relationships with them, and encouraging the development of new partnerships.

Based on comments received on our proposed rule, we could not conclude that all landowners view designation of critical habitat as imposing a burden, and exclusion from designation as removing that burden and thereby strengthening the ongoing relationship. While no conservation agreement partner affirmatively requested designation, we would have viewed the exclusion as likely to harm rather than benefit the relationship. Where a conservation agreement partner has

remained silent on the benefit of exclusion of its land, we do not believe the record supports a presumption that exclusion will enhance the relationship. Similarly, we do not believe it provides an incentive to other landowners to seek a conservation agreement if our exclusions are not in response to an expressed landowner preference. We anticipate further rulemaking in the future to refine these designations, for example, in response to developments in recovery planning. As part of future revisions, we will consider information we receive from those with approved conservation agreements regarding the effect of designation on our ongoing partnership. While we have done so in the past, in this rulemaking we did not consider any pending HCPs for exclusion, primarily because none of the pending HCPs were at a point we could do so without prejudging the outcome of the ongoing HCP process and because we expect further changes to the developing HCPs. In addition, we expect to have future opportunities to refine this designation to provide credit for future activities on private lands as well as currently ongoing activities for which there was insufficient time to adequately review and make a benefits determination. When we review this designation in the future, we will consider whether any exclusion will outweigh the benefit of designation in any particular case.

During the comment period we received comments from five landowners with current HCPs that they would consider exclusion as a benefit to our ongoing relationship—Washington Department of Natural Resources (WDNR), Green Diamond Resources Company, City of Seattle Cedar River Watershed, Tacoma Water Green River, and Plum Creek/Stimson Lumber Company Native Fish HCPs.

WDNR

The Washington Department of Natural Resources HCP covers about 1.6 million acres of State forest trust lands within the range of the northern spotted owl in the state of Washington. The majority of the HCP (approximately 1.3 million acres) occurs west of the Cascade Crest and includes the Olympic Peninsula and Southwest Washington. The remainder of the HCP occurs on the east side of the Cascade Mountains within the range of the northern spotted owl. The HCP covers activities primarily associated with commercial forest management. It is an ''all-species'' HCP west of the Cascade Crest, which includes bull trout and other salmonids. On the east side of the Cascade Crest, bull trout and other aquatic species are not covered under the HCP and DNR is therefore required to follow State Forest Practice Rules for riparian management and other forestry activities. The DNR HCP lands on the west side of the Olympic Peninsula are managed as the Olympic Experimental State Forest. The multi-species portion of the HCP depends upon several broad-scale conservation approaches: Spotted owl conservation, marbled murrelet conservation, riparian conservation, certain species-specific protection measures, protection of uncommon habitats, and provisions to maintain a range of forest types across the HCP landscape.

Green Diamond HCP

In October 2000, an HCP (formerly referred to as the Simpson Timber HCP and currently referred to as the Green Diamond HCP) was completed and an incidental take permit was issued for forestry operations on over 261,000 acres of the company's Washington timberlands located on or adjacent to the Olympic Peninsula in Mason, Thurston, and Grays Harbor Counties. The HCP is designed to conserve riparian forests, improve water quality, prevent management-related hill-slope instability, and address hydrological maturity of small sub-basins. The plan addresses five listed species including bull trout and 46 other species. The HCP covers the land owned by Green Diamond along the lower reaches of the North Fork and South Fork Skokomish Rivers, the upper South Fork Skokomish River, West Fork Satsop River, and Canyon River. The HCP is designed to conserve riparian forests, improve water quality, prevent management-related hill-slope instability, and address hydrological maturity of small sub-basins.

City of Seattle Cedar River Watershed HCP

In April 2000, The Cedar River Watershed HCP was completed and an incidental take permit was issued to the City of Seattle for water withdrawal and water supply activities affecting flows in the lower Cedar River and reservoir levels in Chester Morse Lake. In addition, the plan provides for forestry restoration activities including riparian thinning, road abandonment, and timber stand improvement on over 91,000 acres in the upper Cedar River Watershed in King County. The HCP is designed to provide adequate fish flows in the lower Cedar River for the spawning and rearing of several salmonid species, to manage water levels in Chester Morse Lake and Masonry Dam Reservoir to benefit instream flows in the lower river and bull trout spawning access to lake tributaries, and to manage 91,000 acres in the upper Cedar River as an ecological reserve. Several research actions are directed at understanding how all life stages of bull trout use Chester Morse Lake and Masonry Pool and how adult bull trout use tributaries to the lake for spawning. The HCP covers 83 species of fish and wildlife including bull trout and six other listed species.

Tacoma Water Green River HCP

The Tacoma Water Green River Water Supply Operations and Watershed Protection HCP was completed in July of 2001 and addresses upstream and downstream fish-passage issues, flows in the middle and lower Green River, and timber- and watershed-management activities on about 15,000 acres of Tacoma-owned land in the upper Green River Watershed. The HCP covers 32 species including bull trout. This HCP required close coordination with the U.S. Army Corps of Engineers (COE) because of their facility at Howard Hanson Dam. Tacoma's HCP includes the following features: An upstream fish-passage facility which will open up 220 square miles of previously blocked fish habitat; sponsorship and funding for a downstream fish-passage facility at the Corps of Engineers Howard Hanson Dam; water-flow improvements; improved riparian forest management on Tacoma's lands; and several major habitat restoration projects.

Plum Creek/Stimson Lumber Company Native Fish HCPs

Plum Creek Timber Company initiated an effort in 1997 to develop a conservation strategy for native salmonids (including bull trout), occurring on 1.6 million acres of Plum Creek's Timberlands in Montana, Idaho, and Washington. The stated purpose of the Plum Creek Native Fish Habitat Conservation Plan (NFHCP) was to help conserve native salmonids and their ecosystems while allowing Plum Creek to continue to conduct commercial timber harvest within a framework of long term regulatory certainty and flexibility. The Stimson Lumber NFHCP was created when the Stimson Lumber Company acquired certain lands previously owned by Plum Creek and assumed all of the Plum Creek NFHCP commitments. Because of the commonality, for purposes of this discussion, the Plum Creek and Stimson NFHCP are considered one and the same. The Plum Creek NFHCP covers approximately 1.4 million acres, all within the range of the Columbia River basin. NFHCP actions should maintain

a high-level of water quality. They are expected to maintain the thermal regime of streams within the range of normal variation, and contribute to the maintenance of complex stream channels, appropriate substrates, a natural hydrologic regime, ground-water sources and subsurface connectivity, migratory corridors, and an abundant food base. NFHCP actions are not expected to introduce or favor nonnative competitors or predators. In short, the NFHCP is expected to benefit the aquatic environment by providing a gradual improvement in the cold and clean water as well as complex and connected habitat necessary for protection and restoration of bull trout.

(1) Benefits of Inclusion of the WDNR, Green Diamond, City of Seattle Cedar River Watershed, Tacoma Water Green River, and Plum Creek/Stimson Lumber Company Native Fish HCPs

The principal regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation pursuant to section 7 of the Act to ensure that they will not destroy or adversely modify critical habitat. In the recent *Gifford Pinchot* decision, the 9th Circuit Court of Appeals has ruled that adverse modification evaluations require consideration of impacts on the recovery of species. Conducting section 7 consultations would provide benefits on HCP lands with a Federal nexus by helping ensure the integrity of these lands is maintained. For example, if a federally funded road project was proposed to go across respective HCP lands that were designated as critical habitat, a consultation would need to be conducted to ensure the designated critical habitat was not destroyed or adversely modified to the point of appreciably diminishing its habitat features essential to bull trout recovery.

Designation of critical habitat facilitates state and local regulatory agencies in taking further protective measures where critical habitat is designated resulting in potential additional changes in operations at the aforementioned hydroelectric projects. In fact, State law requires consideration of additional rules and areas for protection upon designation of critical habitat.

To the extent that critical habitat would result in environmental protection (*e.g.*, changes to Federal projects that otherwise would have resulted in destruction or adverse modification) that would exceed the protection garnered from other environmental regulations (*e.g.*, Clean Water Act), there would be some benefit associated with maintaining fish passage survival standards, fish production through hatcheries to compensate for population losses, and tributary habitat loss compensation that would translate into economic benefits such as those that may result from increased recreational fishing opportunities for other species that would benefit from such management.

Another recognized benefit of including lands or sections of rivers in critical habitat is that the designation of critical habitat serves to educate landowners, hydroelectric operators, state and local governments, and the public regarding the potential conservation value of an area. This helps focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation value for bull trout. Designation of critical habitat would inform state agencies and local governments about areas that could be conserved under state laws or local ordinances, such as the Washington State Growth Management Act or Washington State Shoreline Management Act which encourage the protection of ''critical areas'' including fish and wildlife habitat conservation areas based on the best available science.

(2) Benefits of Exclusion of the WDNR, Green Diamond, City of Seattle Cedar River Watershed, Tacoma Water Green River, and Plum Creek/Stimson Lumber Company Native Fish HCPs

We identified a number of possible benefits of excluding the area covered by these HCPs from critical habitat designation. First, to the extent designation would provide any additional protection of bull trout habitat, costs associated with that protection would be avoided. Second, exclusion would reduce largely redundant administrative costs of section 7 consultation; as discussed above, these costs are unlikely to lead to additional actual protection for bull trout habitat. Third, exclusion would provide an incentive for participation in the development of new HCPs. Fourth, exclusion would help to foster an atmosphere of cooperation in the conservation of endangered species.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion for the WDNR, Green Diamond, City of Seattle Cedar River Watershed, Tacoma Water Green River, and Plum Creek/Stimson Lumber Company Native Fish HCPs

As discussed above, it is possible, although unlikely, that any Federal action will be proposed that would be likely to destroy or adversely modify the habitat proposed as critical within the area governed by these HCPs. If such a project was proposed, due to the specific way in which jeopardy and adverse modification are analyzed for bull trout, discussed in detail in the preamble, it would likely also jeopardize the continued existence of the species. In addition, as discussed above, we expect that the benefit of informing the public of the importance of this area to bull trout conservation would be slight. Therefore, we assign relatively little weight to the benefits of designating this area as critical habitat.

In contrast, although the benefits of encouraging participation in HCPs, particularly large-scale HCPs, and, more broadly, helping to foster cooperative conservation are indirect, enthusiastic HCP participation and an atmosphere of cooperation are crucial to the long-term effectiveness of the endangered species program. Therefore, we assign great weight to these benefits of exclusion. To the extent that there are regulatory benefits of including, there would be associated costs that could be avoided by excluding the area from designation. However, as we expect the regulatory benefits to be slight, we likewise give little weight to avoidance of those associated costs, as well as the additional transaction costs related to section 7 compliance.

Therefore, we have determined that the benefits of inclusion of the areas covered by these HCPs are small, while the benefits of exclusion are more significant. Therefore, the benefits of exclusion outweigh the benefits of inclusion. Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands, the exclusion will not result in the extinction of the bull trout. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation (see comprehensive exclusion language in the preamble).

For those conservation agreements, we analyzed the activities covered by the agreement, the protections afforded by the agreement, and the Federal activities that are likely to occur on the affected lands. We considered the number of stream miles within these lands and the number of expected section 7 consultations in those areas. From this information we determined the benefit of designation, which we then weighed against the benefit of exclusion. We concluded that the benefits of exclusion species outweigh the benefits of designation and therefore have excluded lands covered by these agreements in this final designation.

The analysis is described in further detail in the FWS Administrative Record. We have determined that these exclusions, together with the other exclusions described in this rule, will not result in extinction of the species (for a complete documentation of our 3(5)(a) and 4(b)(2) analyses, please refer to our supporting document, *Bull Trout Critical Habitat 3(5)(a) and 4(b)(2) Analyses).*

Lewis River Hydroelectric Projects Conservation Easements

There are four projects and three dams that impound over 30 miles of river habitat on the Lewis River in Washington. They are located in portions of Clark, Cowlitz, and Skamania Counties. Bull trout are present in all of the reservoirs; the upper two reservoirs have the most significant populations and also support spawning populations. A Settlement Agreement (Agreement) for the relicensing of the Yale, Merwin, Swift No. 1, and Swift No. 2 hydroelectric projects was signed on November 30, 2004. Conservation measures are incorporated in the Agreement to minimize or compensate for the effects of the projects on listed species, including bull trout. Conservation measures for bull trout include perpetual conservation covenants on PacifiCorp's lands in the Cougar/Panamaker Creek area and PacifiCorp's and Cowlitz PUD's lands along the Swift Creek arm of Swift Creek Reservoir, upstream and downstream fish passage improvements at all reservoirs, limiting-factors analysis for bull trout to determine additional enhancement measures, public information program to protect bull trout, and monitoring and evaluation efforts for bull trout conservation measures. This agreement will also restore anadromous salmon to the upper Lewis River system, restoring a significant part of the historic forage base for bull trout.

(1) Benefits of Inclusion

Designation of critical habitat for bull trout on lands managed under Lewis River Hydroelectric Projects Conservation Easements would provide protection from ''destruction or adverse modification'' of designated critical habitat under section 7 of the Act. However, without designation, a certain amount of habitat protection would be provided through the jeopardy standard. As noted earlier, based on our review of previous bull trout consultations under this standard, we have found little to indicate that there would be additional habitat protections generated by the designation beyond those provided through the jeopardy standard.

If critical habitat was designated in areas of unoccupied habitat or currently occupied areas that subsequently become unoccupied, there would not be a jeopardy analysis for the species. The adverse effect to critical habitat would have to rise to the level of destruction/adverse modification to effect changes in the proposed action via a Reasonable and Prudent Alternative. Since the destruction/adverse modification determination is made in the context of an entire critical habitat designation, this would be a rare occurrence.

Designating critical habitat can educate the public and management agencies about the distribution of areas containing features essential to the conservation of a species. In areas lacking a bull trout-specific management plan, designation can guide projects to avoid impacts to listed species and can help focus recovery efforts. However, we believe little additional informational benefit will be gained by including Swift and Cougar Creeks in designated critical habitat for bull trout. PacifiCorp has begun implementing conservation recommendations, provided in our 2002 biological opinion, that include posting interpretive signs to educate anglers on identifying and conserving native char, and techniques for catch and release to minimize incidental hooking mortality of bull trout. While we believe educational benefits are important for the conservation of bull trout, we believe it has already been achieved through PacifiCorp's conservation easement, publication of the proposed critical habitat rule, the many public and interagency meetings that have been held to discuss the proposal, and discussion contained in this final rule.

(2) Benefits of Exclusion

The complex process of negotiating relicensing for the Lewis River hydroelectric projects has been ongoing for 9 years. We have established valuable working relationships with the PacifiCorp, Cowlitz County PUD, and the other participants during these complex negotiations. Through the relicensing negotiations, we have built trust and encouraged open dialogue regarding aquatic and riparian management issues among the participants.

By excluding lands included in the two conservation easements from designated critical habitat we will: (1) Maintain and enhance our ability to continue working with PacifiCorp, Cowlitz County PUD, other relicensing applicants, and FERC; and (2) other jurisdictions, private landowners, and other entities will likely continue to see the benefit of working cooperatively with us. This will provide incentives to develop other conservation agreements, or other conservation actions such as HCPs, to provide the bases for future opportunities to conserve species and their habitats. Negotiating conservation measures under conditions of mutual trust can result in greater conservation benefits to the species than would result from including Swift and Cougar Creeks in designated critical habitat.

Exclusion would also reduce administrative costs of conducting section 7 consultations on bull trout critical habitat (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section above).

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

It is possible, although unlikely, that any Federal action will be proposed that would be likely to destroy or adversely modify the habitat proposed as critical within the area governed by the Lewis River Conservation Easement. If such a project was proposed, due to the specific way in which jeopardy and adverse modification are analyzed for bull trout, discussed in detail above, it would likely also jeopardize the continued existence of the species. In addition, as discussed above, we expect that the benefit of informing the public of the importance of this area to bull trout conservation would be slight. Therefore, we assign relatively little weight to the benefits of designating this area as critical habitat.

In contrast, although the benefits of encouraging participation in conservation partnerships, particularly large-scale conservation projects, and, more broadly, helping to foster cooperative conservation are indirect, enthusiastic conservation project participation and an atmosphere of cooperation are crucial to the long-term effectiveness of the endangered species program. Therefore, we assign great weight to these benefits of exclusion. To the extent that there are regulatory benefits of including, there would be associated costs that could be avoided by excluding the area from designation. However, as we expect the regulatory benefits to be slight, we likewise give little weight to avoidance of those associated costs, as well as the additional transaction costs related to section 7 compliance.

Therefore, we have determined that the benefits of inclusion of the areas covered by this conservation easement are small, while the benefits of exclusion are more significant.

Therefore, the benefits of exclusion outweigh the benefits of inclusion. Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands, the exclusion will not result in the extinction of the bull trout. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation (see comprehensive exclusion language in the preamble).

Washington State Forest Practices Rules and Forest Practices Regulations for Bull Trout (FFR)

Beginning in late 1996, faced with the imminent listing of several salmonid species, including bull trout, under the Endangered Species Act (ESA), a diverse group of stakeholders in Washington State agreed to address emerging riparian habitat issues. After almost 2 years of negotiations, representatives of environmental interests and some Tribes withdrew from negotiations. The remaining participants continued negotiating and eventually agreed to the Forests and Fish Report in April 1999. Later that year the Washington State Legislature passed the Forest Practices Salmon Recovery Act (Engrossed Substitute House Bill 2091), which directed the Washington Forest Practices Board to adopt new rules, encouraging the Forest Practices Board to follow the recommendations of the Forests and Fish Report (FFR). To further the purpose of regulatory stability, the Forest Practices Salmon Recovery Act also limited future changes to the new rules so that outside of a court order or legislative directive, new rules could be adopted by the Forest Practices Board ''only if the changes or new rules are consistent with the recommendations resulting from the scientifically based adaptive management process'' included in the Forests and Fish Report. The language further solidified the adaptive management process as a key component of the conservation program.

Following the passage in 1999 of emergency forest practices rules based on the Forests and Fish Report, the Washington Forest Practices Board adopted new permanent rules in May 2001. Effective July 2001, these rules cover a wide variety of forest practices and include: (1) A new, more functional, classification of rivers and streams on non-federal and non-tribal forestland; (2) improved plans for properly designing, maintaining, and upgrading existing and new forest roads; (3) additional protections for unstable slopes; and (4) greater protections for riparian areas intended to restore or maintain properly functioning aquatic and riparian habitat conditions. In addition to these substantive provisions, the rules adopted the procedural recommendations of the Forests and Fish Report that address adaptive management, training, and other features. The Washington State Legislature and U.S. Congress continued to support the collaboration with significant funding for the research, monitoring, and adaptive management activities called for in the Forests and Fish Report.

(1) Benefits of Inclusion

Designation of critical habitat for bull trout on lands managed under Washington State Forest Practices Rules would provide protection from ''destruction or adverse modification'' of designated critical habitat under section 7 of the Act. However, without designation, a certain amount of habitat protection would be provided through the jeopardy standard. As noted earlier, based on our review of previous bull trout consultations under this standard, we have found little to indicate that there would be additional habitat protections generated by the designation beyond those provided through the jeopardy standard.

If critical habitat was designated in areas of unoccupied habitat or currently occupied areas that subsequently become unoccupied, there would not necessarily be a jeopardy analysis for the species. The adverse effect to critical habitat would have to rise to the level of destruction/adverse modification to effect changes in the proposed action via a Reasonable and Prudent Alternative. Since the destruction/adverse modification determination is made in the context of an entire critical habitat designation, this would be a rare occurrence.

In addition to the prescriptions in the Rules for protecting riparian and aquatic habitat that benefits the broad range of aquatic species, the Rules include specific provisions for protecting bull trout habitat in eastern Washington. Beyond this, there is adaptive management research and monitoring required under the Washington Forest Practices Rules that specifically addresses the effectiveness and validity of the Rules in protecting bull trout habitat.

Designating critical habitat can educate the public and management agencies about the distribution of areas containing features essential to the conservation of a species. In areas lacking a bull trout-specific management plan, designation can guide projects to avoid impacts to listed species and can help focus recovery efforts. Many landowners subject to Washington State Forest Practices Rules are likely aware of the concerns for bull trout conservation. We expect that designated critical habitat in these areas would provide some additional context, protection, or benefit that would enhance existing, or future, bull trout conservation efforts.

(2) Benefits of Exclusion

The Washington Forest Practices Rules require a large-scale, comprehensive adaptive management program that is supported by in-kind participation by the stakeholders that authored the Forests and Fish Report. The basis for the Washington Forest Practices Rules is the Forests and Fish Report. The Forests and Fish Report was created in a collaborative effort by multi-stakeholders to identify goals and prescriptions to protect riparian and aquatic-dependent species, including bull trout. This cooperative conservation is crucial to the long-term recovery of listed species.

Exclusion of areas covered by the Washington Forest Practices Rules from critical habitat designation would be viewed as honoring the assurances made during the negotiations of the Forests and Fish Report by most Washington forestland stakeholders. The assurances being that the Rules provide adequate minimization and mitigation measures to address bull trout conservation. Failure to exclude the Rules could be viewed as an attempt to extract additional and ''unfair'' mitigation in violation of the principles behind the Washington Forest Practices Rules and Forests and Fish Report negotiations. Cooperation between the Service and the State to develop and update the Washington Forest Practices Rules for terrestrial, threatened and endangered species would be enhanced through continued cooperative relationships.

In addition, failure to exclude the Rules could be a disincentive for other entities contemplating collaborative rule-making as it would imply that the Service intends to impose additional regulatory burdens once conservation measures have been agreed upon and could undermine the progress made by generating perceptions that we might erode those assurances.

Exclusion would also reduce administrative costs of conducting section 7 consultations on bull trout critical habitat (see Section 3(5)(A) and Exclusions Under Section 4(b)(2)—Generally section above).

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

It is possible, although very unlikely, that any Federal action would be proposed that would be likely to destroy or adversely modify the habitat proposed as critical within the lands regulated by the Washington Forest Practices Rules. If such a project was proposed, due to the specific way in which jeopardy and adverse modification are analyzed for bull trout, discussed in detail in the preamble, it would likely also jeopardize the continued existence of the species.

The forest landowners regulated by the Washington Forest Practices Rules, as well as those organizations that are directly or indirectly affected by the Rules, are already aware of the need for protecting and conserving bull trout and their habitat.

Based on the above discussion, we assign relatively little weight to the benefits of designating the lands regulated by the Washington Forest Practices Rules as critical habitat for bull trout. In contrast, because exclusions of these areas from critical habitat will be very beneficial to our relationships with stakeholders in the FFR process, and those relationships area crucial to the long-term recovery of bull trout and other listed species, we assign great weight to the benefits of excluding these lands from designation. Therefore, the benefits of exclusion outweigh the benefits of inclusion. Because we anticipate that little, if any, conservation benefit to bull trout will be foregone as a result of excluding these lands, the exclusion will not result in the extinction of bull trout. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation (see comprehensive exclusion language in the preamble).

Jarbidge River Bull Trout Critical Habitat Unit

During the last decade, the Jarbidge River watershed has been the site of substantial conflicts between Federal officials and local interests concerning the conservation and management of bull trout, the Jarbidge River, and associated uplands (Williams 2001). These conflicts, which involved anti-government protests and demonstrations, have had an overall negative impact on the Federal government's ability to work cooperatively with local officials and private landowners to conserve and recover the bull trout and other listed species on Federal and non-federal lands in northern Nevada (Sonner 2001, Williams 2001, Robert 2002). This cooperative relationship is particularly important in relation to achieving voluntary actions to improve bull trout populations and habitat which are identified in the recovery plan.

During the last year, however, both the Service and the U.S. Forest Service have dedicated significant resources and have made encouraging progress in restoring cooperative relationships with the local community. For example, both agencies have received a ''Certificate of Appreciation'' from Elko County on September 7, 2005, for providing support for the installation of a temporary bridge over the Jarbidge River. Maintenance and improvement of such relationships is key to recovering listed species and is a cornerstone of the Secretary's ''4 C's'' policy. The active support of local officials and landowners for the conservation of bull trout increases the species likelihood of recovery. In contrast, local opposition to bull trout conservation efforts could be a significant impediment to the species' recovery, especially on non-federal lands, where the voluntary efforts will achieve actions identified in the recovery plan.

Given this history, we considered whether to exclude non-federal lands in the Jarbidge River Bull Trout Critical Habitat Unit (CHU) from the final critical habitat designation. Pursuant to section 4(b)(2) we analyzed whether the benefits of designating these lands were outweighed by the benefits of excluding these lands from a final designation. In the following section, we evaluate a ''without critical habitat'' scenario and compare it to a ''with critical habitat'' scenario. The difference between the two scenarios measured the net negative or positive impacts attributable to the designation of critical habitat. We paid particular attention to the following issues:

- The degree to which a critical habitat designation would confer regulatory conservation benefits on these species (*e.g.*, high, medium, low);
- Whether the designation would educate members of the public such that conservation efforts would be enhanced;
- Whether a critical habitat designation would have a positive, neutral, or negative impact on local support for bull trout conservation, including current cooperative efforts on privately-owned lands; and
- To what extent a critical habitat designation is likely to encourage or discourage future cooperative efforts with local landowners and officials.

If a critical habitat designation results in a quantifiable reduction in the likelihood that existing or future voluntary, cooperative conservation activities will be carried out on non-federal lands, and at the same time fails to confer a counter-balancing positive regulatory or educational benefit to the species, then the benefits of excluding such areas from critical habitat outweigh the benefits of including them.

(1) Benefits of Including the Jarbidge River Bull Trout Critical Habitat Unit

The principal benefit of designating critical habitat on non-federal lands is that Federal activities that may affect such habitat are subject to consultation pursuant to section 7 of the Act. Such consultation requires every Federal agency to ensure that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat. This requirement complements the section 7 provision that Federal agencies ensure that their actions are not likely to jeopardize the continued existence of a listed species.

The Jarbidge River is currently occupied by bull trout. Any Federal activity adversely affecting bull trout will require section 7 consultations with the Service, and any non-federal action that may take a bull trout will require a Section 10 permit. Although there are potentially a small number of federally-funded, authorized, or implemented activities on private and State lands that may trigger section 7 consultation, the subject lands comprise only a minor portion (8 percent) of the total habitat (131 mi, 211 km) under consideration for this CHU. Specifically, there are eight stream reaches crossing private lands and four reaches crossing Idaho State school land sections within occupied bull trout habitat in this CHU. Only three of these isolated reaches are 1 mi (1.6 km) or more in length, and all are surrounded by vast expanses of public lands. One of the private reaches is within the town of Jarbidge, Nevada, and another is within the town of Murphy Hot Springs, Idaho.

In analyzing whether Federal actions might jeopardize the continued existence of the bull trout, the Service has focused on the viability of core area populations without making distinctions between what is necessary for survival versus recovery. Because the Service views the conservation role of critical habitat units as supporting viable bull trout core area populations, the Service anticipates that few Federal actions would adversely modify critical habitat but not jeopardize the species.

The Service considered the possibility of local bull trout extirpation in the Jarbidge River (which might reduce the protection afforded bull trout by the

jeopardy prohibition) given the data available. In general, the Service does not anticipate significant extirpations in this area, although such an event cannot be completely ruled out as stochastic events such as conflagrations have in the past eliminated populations elsewhere within the species' range. If such an event was to occur, and the entire population was extirpated, the designation of critical habitat could provide important protection to the habitat to preserve it for eventual recolonization or reintroduction. However, the Service would consider the habitat occupied for 20 years subsequent to the temporal extirpation, providing ample opportunity for restoration of the population. In addition, the benefit would be moderated to the extent that protections other than the prohibition on jeopardizing bull trout would remain in place. For instance, State angling regulations would remain in place to manage bull trout habitat.

In sum, the designation of critical habitat on non-federal lands in the Jarbidge River CHU would confer a relatively low level of additional regulatory benefits beyond the status quo.

Another potential benefit is that the designation of critical habitat can serve to educate the public regarding the potential conservation value of an area and thereby focus and contribute to conservation efforts by clearly delineating areas of high conservation value for certain species. Such a benefit could be substantial in geographic areas where the presence of bull trout was a relatively new or unknown phenomenon, and there was a need to educate the local community to the species' presence and conservation needs. However, such a situation does not exist anywhere in the Jarbidge River CHU. Due in large part to the extensive media attention applied to the high-profile conflicts that accompanied the listing of the species and previous critical habitat proposals; there is widespread knowledge of the species' local status and conservation needs. State fish and game officials have also worked hard to educate the local populace, publishing information on the species and posting signs at public access points along the river. Therefore, it is unlikely that a final critical habitat designation would provide any significant new or additional educational benefit beyond the status quo.

(2) Benefits of Excluding the Jarbidge River Bull Trout Critical Habitat Unit

The designation of critical habitat on non-federal lands can have both negative and positive impacts on the conservation of listed species (Bean 2002). There is a growing body of documentation that some regulatory actions by the Federal government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on non-federal lands (Brook *et al.* 2003, Bean 2002, James 2002, Koch 2002, Wilcove *et al.* 1996). Some landowners fear a decline in value of their properties because of their belief that the Act may restrict future land-use options where threatened or endangered species are found. Consequently, endangered species are perceived by many landowners as a financial liability, which sometimes results in anti-conservation incentives to these landowners (Brook *et al.* 2003, Main *et al.* 1999).

There are reasonable concerns that a critical habitat designation in the Jarbidge River may negatively affect cooperative relationships between Federal and local officials and discourage voluntary, cooperative conservation efforts. The watershed has been the site of substantial conflicts between Federal government agencies, local government entities (Elko County, Nevada), organized private groups (Jarbidge Shovel Brigade), and private individuals. These conflicts primarily have been over roads and public access issues with the U.S. Forest Service, but they have resulted in activities with adverse environmental impacts to bull trout and their habitat. Substantial damage to stream channel and riparian habitats within bull trout occupied reaches occurred due to local actions while bull trout were proposed for listing. Anti-government demonstrations and on-the-ground activities (road construction, stream diversions, channel alterations, tree cutting, and driving in streams) by other groups and individuals escalated when the Service emergency-listed the Jarbidge River bull trout in 1998. The demonstrations and protests continued for several years.

According to some researchers, the designation of critical habitat on private lands significantly reduces the likelihood that many landowners will support and carry out conservation actions (Bean 2002, Brook *et al.* 2003, Main *et al.* 1999). The magnitude of this negative outcome is greatly amplified in conservation situations, such as on privately-owned lowlands in California and Nevada, where it is insufficient simply to prohibit harmful activities. Instead, it is necessary in most cases to encourage and carry out active management measures to prevent extinctions and promote recovery (Bean 2002). Consideration of this concern is especially important in areas where recovery efforts require access and permission for survey and restoration efforts. Simply preventing ''harmful activities'' will not slow the extinction of listed species or promote their recovery. Proactive, voluntary conservation efforts are necessary to prevent the extinction and promote the recovery of these species (Wilcove and Lee 2004, Shogren *et al.* 1999).

The Service is working to promote cooperative activities in the Jarbidge area. Federal and local government entities working in the Jarbidge River watershed have spent considerable time improving communications and developing personal working relationships to resolve differences and move forward in a positive manner on watershed issues. In particular, the agencies have come to an agreement resolving future road construction and maintenance issues within bull trout occupied areas on public and private lands in the watershed, as presented in the U.S. Forest Service's Jarbidge Canyon Final Environmental Impact Statement issued in April, 2005.

In addition, the Federal agencies and local county government officials recently collaborated on a project to provide access to the town of Jarbidge on an emergency basis using volunteer labor by the Jarbidge Shovel Brigade and other local individuals to help install a temporary bridge donated by the county on private land after a flood destroyed two U.S. Forest Service bridges. On September 7, 2005, the Elko County Board of County Commissioners presented the Service, U.S. Forest Service, and Jarbidge Shovel Brigade each with a Certificate of Appreciation for assistance in completing this project.

The Service is also currently working with a private landowner (Mr. Bert Brackett) and the Nevada Department of Wildlife to acquire the single largest reach of bull trout habitat on private land in the entire watershed (nearly 4 mi, 6.4 km) through a Service Recovery Lands Acquisition Program grant. The State would then manage this habitat specifically for the purpose of bull trout conservation and recovery. The Service is concerned that acquisition negotiations could be adversely affected by designation of critical habitat at this time due to a resurgence of local anti-federal sentiment following a possible designation on non-federal lands.

The Service is also preparing to finalize the May 2004 draft recovery plan for the Jarbidge River bull trout population and to hold stakeholder meetings in FY06. Public and local government participation at these meetings is vital in obtaining local input during the recovery planning process. Participation at these meetings by private landowners—and support for conservation on their lands—may be adversely affected by designation of critical habitat on their non-federal lands.

In sum, we conclude that the designation of critical habitat on non-federal lands in the Jarbidge River CHU would have significant negative impacts on the improving cooperative relationship between Federal agencies and local officials and landowners. This negative impact would in turn adversely affect bull trout conservation because local support and participation is necessary for bull trout recovery actions, all of which are voluntary on non-federal lands. Avoiding these negative impacts is a benefit of excluding these lands from the final critical habitat designation.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion for the Jarbidge River Critical Habitat Unit

As discussed above, it is possible although unlikely that a Federal action will be proposed that would be likely to destroy or adversely modify the habitat proposed as critical in the Jarbidge River CHU. If such a project was proposed, due to the specific way in which jeopardy and adverse modification are analyzed for bull trout and as discussed in detail in the preamble, it would likely also jeopardize the continued existence of the species and thus be restricted by the Act. In addition, we expect that the benefit of informing the public of the importance of this area to bull trout conservation would be slight. Therefore, we assign relatively little weight to the benefits of designating this area as critical habitat.

In contrast, the need to maintain and expand recent gains in cooperative conservation efforts in the Jarbidge watershed is crucial to the long-term effectiveness of bull trout recovery. Therefore, we assign great weight to these benefits of exclusion. To the extent that there are regulatory benefits of including, there would be associated costs that could be avoided by excluding the area from designation. However, as we expect the regulatory benefits to be slight, we likewise give little weight to avoidance of those associated costs, as well as the additional transaction costs related to section 7 compliance.

The continuation of cooperative efforts in the watershed, as well as implementation of bull trout recovery actions on non-federal lands, is dependent on maintaining effective working relationships with local entities. We believe that designation of critical habitat on non-federal lands within the Jarbidge River CHU would adversely affect our improved working relationships with landowners and other governmental entities, as well as the benefits to bull trout resulting from these relationships. In addition, we believe that such designation may also impair the long-term working relationships of other Federal agencies with land management responsibilities in the Jarbidge River watershed.

Therefore, we have determined that the benefits of inclusion of the non-federal areas within the Jarbidge River CHU are small, while the benefits of exclusion are more significant. Thus the benefits of exclusion outweigh the benefits of inclusion. Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands, and the species and much of its habitat is still protected under section 7 as described above, the exclusion will not result in the extinction of the bull trout. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation.

Federal Land Management Plans

We have determined that PACFISH, INFISH, the Interior Columbia Basin Ecosystem Management Project (ICBMP) strategy, and the Northwest Forest Plan (NWFP) Aquatic Conservation Strategy (ACS) provide a level of conservation and adequate protection and special management for the PCEs essential to the conservation of bull trout at least comparable to that achieved by designating critical habitat. As a result, those lands are not being designated critical habitat as they do not meet the statutory definition. In many specific ways these plans are superior to a designation in that they require enhancement and restoration of habitat, acts not required by the designation.

PACFISH is the Interim Strategy for Managing Anadromous Fish-Producing Watersheds and includes Federal lands in Western Oregon and Washington, Idaho, and Portions of California. INFISH is the Interim Strategy for Managing Fish-Producing Watersheds in Eastern Oregon and Washington, Idaho, Western Montana, and Portions of Nevada. Each strategy amended Forest Service Land and Resource Management Plans and BLM Resource Management Plans. Together PACFISH and INFISH cover thousands of miles of waterways within 16 million acres and provide a system for reducing effects from land management activities to aquatic resources through riparian management goals, landscape scale interim riparian management objectives, riparian habitat conservation areas, riparian standards, watershed analysis, and the designation of Key and Priority watersheds. These interim strategies have been in place since 1992 and are part of the management plans for the BLM and USFS lands. In addition to protecting and managing the PCEs associated with critical habitat, the strategies include restoration and enhancement of all existing habitat. The BLM and USFS are currently in the process of updating their management plans, few have been completed, but those that have, are discussed below. The new plans are more protective, more complete, and more outcome based than the former plans. In addition, they are recovery based, as opposed to simply maintaining the status quo.

The ICBMP is the strategy that replaces the PACFISH and INFISH interim strategies. The Southwest Idaho Land and Resource Management Plan (LRMP) is the first LRMP under the strategy and provides measures that protect and restore soil, water, riparian and aquatic resources during project implementation while providing flexibility to address both short- and long-term social and economic goals on 6.6 million acres of National Forest lands. This plan includes a long-term Aquatic Conservation Strategy that focuses restoration dollars in priority subwatersheds identified as important to achieving ESA, Tribal, and CWA goals. The Southwest Idaho LRMP replaces the interim PACFISH/INFISH strategies and adds additional conservation elements, specifically, providing an ecosystem management foundation, a prioritization for restoration integrated across multiple scales, and adaptable active, passive and conservation management strategies that address both protection and restoration of habitat and 303(d) stream segments, all of which are far beyond any protection provided by a critical habitat designation.

The Southeast Oregon Resource Management Plan (SEORMP) and Record of Decision is the second LRMP under the ICBMP strategy which describes the long-term (20+ years) plan for managing the public lands within the Malheur and Jordan Resource Areas of the Vale District. The SEORMP is a general resource management plan for

4.6 million acres of BLM administered public lands primarily in Malheur County with some acreage in Grant and Harney Counties, Oregon. The SEORMP contains resource objectives, land use allocations, management actions and direction needed to achieve program goals. Under the plan riparian areas, floodplains, and wetlands will be managed to restore, protect, or improve their natural functions relating to water storage, groundwater recharge, water quality, and fish and wildlife values.

The Northwest Forest Plan covers 24.5 million acres in Washington, Oregon, and northern California. The ACS is a component of the Northwest Forest Plan. It was developed to restore and maintain the ecological health of watersheds and the aquatic ecosystems. The four main components of the ACS (Riparian Reserves, Watershed Analysis, Key Watersheds, and Watershed Restoration) are designed to operate together to maintain and restore the productivity and resiliency of riparian and aquatic ecosystems.

These plans establish watershed and riparian goals to maintain or restore all fish habitat;

- Establish aquatic and riparian habitat management objectives;
- Delineate riparian management areas;
- Provide specific standards and guidelines for management activities (timber harvesting, grazing, fire suppression, and mining) in riparian areas;
- Provide a system of key watersheds to protect and restore important fish habitats;
- Call for watershed analyses and subbasin reviews to set priorities and provide guidance on priorities for watershed restoration; and,
- Provide general guidance on implementation and effectiveness monitoring.

It is the objective of the Forest Service and the Bureau of Land Management to manage and maintain habitat and where feasible, and restore habitats that are degraded. These plans provide for the protection of areas that could contribute to the recovery of fish and, overall, improve riparian habitat and water quality throughout the basin. These objectives are accomplished through such activities as closing and rehabilitating roads, replacing culverts, changing grazing and logging practices, and re-planting native vegetation along streams and rivers.

The Forest Service, Natural Resources Conservation Service, and the Bureau of Land Management also provide funds and technical expertise for restoration projects on private lands. Field offices work with local watershed councils and groups to plan and carry out priority restoration projects on both Federal and non-federal lands.

These and other state and local conservation planning efforts provide an exceptional level of cooperative conservation for bull trout and other salmonids and for this reason we have determined that the PCEs in the areas covered by the plans are not in need of special management or protection. These lands have also been excluded using the Secretary's discretion under section 4(b)(2). The following outlines our 3(5)(a) and 4(b)(2) analyses related to exclusions (for a complete documentation of our 3(5)(a) and 4(b)(2) analyses, please refer to our supporting documentation in the administrative record and the comparison of protections provided by a critical habitat designation and the various management plans.

(1) Benefits of Including Lands Managed Under PACFISH, INFISH, the Southwest Idaho Land and Resource Management Plans, the Southeast Oregon Resource Management Plan, and ACS

Designation of critical habitat for bull trout on lands managed under these Federal plans would provide protection from ''destruction or adverse modification'' of designated critical habitat under section 7 of the Act. However, without designation, a certain amount of habitat protection would be provided through the jeopardy standard. As noted earlier, based on our review of previous bull trout consultations under this standard, we have found little to indicate that there would be additional habitat protections generated by the designation beyond those provided through the jeopardy standard.

If critical habitat was designated in areas of unoccupied habitat or currently occupied areas that subsequently become unoccupied, there would not necessarily be a jeopardy analysis for the species. The adverse effect to critical habitat would have to rise to the level of destruction/adverse modification to effect changes in the proposed action via a Reasonable and Prudent Alternative. Since the destruction/adverse modification determination is made in the context of an entire critical habitat designation, this would be a rare occurrence.

Designating critical habitat helps educate the public and management agencies about the distribution of areas containing features essential to the conservation of a species. In areas lacking a bull trout-specific management plan designation can guide projects to avoid impacts to listed species and can help focus recovery efforts. Most agencies, applicants, and partners operating under the existing strategies on Federal lands are aware of the concerns for bull trout conservation. We expect that designated critical habitat in these areas would provide relatively little additional context, protection, or benefit that would enhance existing, or future, bull trout conservation efforts.

(2) Benefits of Excluding Lands Managed Under PACFISH, INFISH, the Southwest Idaho Land and Resource Management Plans, the Southeast Oregon Resource Management Plan, and ACS

The primary benefits of excluding these Federal lands from critical habitat are the avoidance of administrative costs associated with reinitiation of section 7 consultations for ongoing actions and the reduced administrative costs of consultation on new actions. Based on a review of consultations on bull trout critical habitat, some incremental consultation costs, all in the form of administrative costs (i.e., more time spent preparing and reviewing language in our biological opinions or concurrence letters), have been documented. Cost estimates for informal consultations (n = 15) ranged from ''not measurable'' ($0) to a little over one biologist-hour (approx $550). Estimates for formal consultations (n = 9) ranged from one biologist-hour (approx $550) to 10–20 biologist-days ($6,230–$12,460) with a median of 1.5 biologist-days (approx $935). The 10–20 biologist-day estimates represented one forest-wide programmatic formal consultation covering all routine and anticipated activities (potentially hundreds of actions) for a 5-year period.

We expect that the action agencies would also have costs associated with reinitiation of consultation or new consultations because they would need to prepare or revise requests for concurrence or biological assessments. These costs are likely to mirror Service costs because the type and specificity of information required for these documents is comparable to Service documents.

(3) Benefits of Exclusion outweigh the Benefits of Inclusion of the Lands Managed Under PACFISH, INFISH, the Southwest Idaho Land and Resource Management Plans, the Southeast Oregon Resource Management Plan, and ACS

While the administrative costs associated with additional consultation activities which result from designation are not significant, the associated

benefits are also minor. In considering the benefits from a designation related to education the Secretary has determined those benefits are largely redundant with the education that takes place through the NEPA process for developing new management plans, as well as the ongoing management documents used by the BLM and USFS in making decisions on those lands. Because the lands being excluded are Federal lands, no additional state or local protections would be triggered by the critical habitat designation, so in this circumstance, there would be no additional benefit. The remaining benefits, those due to additional protection beyond those provided through the jeopardy consultation are likely very small (see our earlier discussion particular to bull trout jeopardy consultations). The benefit from not designating these Federal lands would be largely in the form of avoided costs (staff time and money). These costs, while not significant are avoidable, create no additional benefit to the species and could be better used to effectuate conservation measures on the ground. As a result, the Secretary has determined that the benefit of excluding these Federal lands exceeds the benefits of including them as critical habitat.

Federal Columbia River Power System (FCRPS)

The FCRPS is composed of 14 dams and reservoirs on the Columbia and Snake Rivers. Power production is coordinated under the Pacific Northwest Coordination Agreement. The dams and reservoirs also provide flood protection and irrigation flows.

The U.S. Department of the Army, Corps of Engineers operates and maintains 12 of the 14 projects in the FCRPS. These projects control the lower Snake and Columbia Rivers and provide storage in the upper reaches of both rivers. The Corps has a major role in coordinating multiple uses of the system. It is responsible for managing flood control storage at all major reservoirs in the Columbia River Basin; maintaining navigation locks and channels to accommodate river transportation; and operating fish passage, power plant and recreation facilities.

U.S. Department of the Interior, Bureau of Reclamation operates Grand Coulee and Hungry Horse Dams, the remaining two projects. Because of its size and location, Grand Coulee Dam plays a prominent role in the coordinated operation of the Columbia River system. Storage at Hungry Horse is also valuable because of its headwaters location; water released from Hungry Horse passes through many downstream projects and produces additional energy.

The FCRPS is subject to the operation of federal laws and the authorities of 9 federal agencies. These authorities require every activity from mitigation to recovery. In addition, the Federal government has responsibility to the 13 tribes residing in the Columbia River Basin. There are 13 nationwide laws and 3 basin-specific laws as well as several mission specific laws, treaties and executive orders, all of which speak to requirements for restoring, enhancing, and recovering ecosystems and fish and wildlife in the Columbia River Basin. All of these laws affect the operation of the FCRPS. The myriad federal and state laws result in no less than 33 federal programs, 3 state programs, and 2 tribal programs to manage and recover ecosystems and wildlife in the basin. As a result of efforts to recover salmon populations, there are at least 65 groups formed to coordinate recovery efforts between the federal agencies, states, tribes, local governments and other interested parties.

(1) Benefits of Inclusion

Designation of critical habitat for bull trout on lands covered under FCRPS would provide protection from ''destruction or adverse modification'' of designated critical habitat under section 7 of the Act. Without designation, a certain amount of habitat protection would be provided through the jeopardy standard. However, as noted earlier, based on our review of previous bull trout consultations under this standard, we have found little to indicate that there would be additional habitat protections generated by the designation beyond those provided through the jeopardy standard.

If critical habitat was designated in areas of unoccupied habitat or currently occupied areas that subsequently become unoccupied, there would not be a jeopardy analysis for the species. The adverse effect to critical habitat would have to rise to the level of destruction/adverse modification to effect changes in the proposed action via a Reasonable and Prudent Alternative. We believe that this will be a rare occurrence.

While one of the benefits of a critical habitat designation can be educating the public, we have determined that there is very little benefit related to educational benefit from a designation for bull trout due to the recent subbasin planning effort completed for the Northwest Power Council, which would largely have duplicated any educational benefit accruing from a critical habitat designation.

(2) Benefits of Exclusion

The major benefit to excluding the FCRPS from critical habitat will be to avoid yet another layer of regulation to a system with a multitude of competing efforts to not only protect but to restore anadromous fish populations as well as enhance and restore terrestrial habitats. The potential inefficiencies are enormous, and have been identified. It is unlikely that a system with so many ongoing efforts to restore habitat and fish populations will knowingly contemplate activities that will reduce populations or habitat values. However, it is very likely that biological opinions related to adverse modification, with their focus on narrow project-by-project effects rather than ecosystem based approaches could force actions contrary to larger efforts, force actions that are redundant or counterproductive, or simply require yet another layer of administrative process without measurably improving the outcome. It is difficult to measure just how much cost such inefficiencies represent. But in a system with 4 states, 13 tribes, 11 federal agencies, and a multiplicity of laws, executive orders, programs, and court orders governing it; yet another process to ensure habitat protection is unlikely to achieve measurable results.

Another benefit of excluding the proposed reaches would be avoiding transactions costs related to reinitiating of consultation for all ongoing projects and the cost of an adverse modification analysis for new projects. The number of circumstances where a bull trout adverse modification finding diverges from a jeopardy opinion are likely to be small and the benefits of requiring all ongoing federal actions to reinitiate consultation will be small when compared to the benefit of avoiding the transactions costs related to the actual completion of the consultation (this assumes that there will be few changes in operations and actions as a result of the reinitiations—consistent with our determinations that the standards will not diverge significantly). While individually these avoided costs are small, the sheer scope of the federal actions outlined in the records that we reviewed indicated that purely ministerial actions associated with the reinitiated consultations would represent significant time and effort.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

The Secretary weighed the risk of some federal project from proceeding in a manner that destroyed or adversely

modified critical habitat and considered the potential benefit if a designation prevented the project from proceeding. She considered the risk of a critical habitat designation causing multiple reinitiations of consultation and what costs and delays those consultations might generate. She considered the consequences of delays related to reinitiations and the risk that would occur to the species as well as to local planning processes associated with the subbasin plans.

Finally, the Secretary considered what additional benefit a consultation on the effect of any project on critical habitat would provide beyond the protection provided by a jeopardy determination that would be made whether or not critical habitat was designated.

Based on the information in the record, the Secretary determined that the benefits of including those reaches of the designation that are within the FCRPS and subject to a consultation under section 7 of the ESA are outweighed by the benefits of excluding them and avoiding one increased costs and inefficiency. Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands, the exclusion will not result in the extinction of the bull trout. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation.

Snake River Basin Adjudication

The lands subject to this adjudication comprise approximately 46 million acres and approximately 142,000 miles of streams in the Snake River Basin. The stream-flows in the basin have been subject to litigation for 21 years. Litigants are the Federal government, the Nez Perce Tribe, and the State of Idaho. In 2004 a settlement was reached by the parties in the proceeding. A Mediator's Term Sheet was developed to guide the settlement of the case, which identifies the responsibilities of the parties over the 30-year term of the agreement. The settlement was announced on May 15, 2004, by the Secretary of the Interior, the Nez Perce Tribal Executive Committee Chairman, and the Governor of Idaho.

As part of the settlement, the parties agreed to establish a habitat fund under two separate accounts, one for the Tribe and one for the State. The State account would be managed through Section 6 cooperative agreements, and would address off-reservation stream-flow and forestry programs. The funds would be used to conduct habitat protection and restoration projects in the Salmon and Clearwater basins (tributaries to the Snake River), including programs intended to protect and restore listed fish and their habitat. The United States would contribute $38 million to these accounts according to a schedule determined by Congress in the enacting legislation. On December 8, 2004, the Snake River Water Rights Act of 2004 was enacted to resolve outstanding issues; reach a final settlement of Tribal claims; authorize, ratify and confirm the Agreement among the parties; direct Federal agencies to execute and perform necessary actions to carry out the agreement; and, to authorize actions and appropriations under the SRBA and the Act for the United States to meet their obligations. On March 31, 2005, a Memorandum of Agreement was signed between the State of Idaho, Nez Perce Tribe, U.S. Fish and Wildlife Service, and National Marine Fisheries Service to establish a process for using the habitat trust fund accounts for habitat protection and restoration projects in the Salmon and Clearwater basins in Idaho. In a March 2005 letter, in response to a request from the State of Idaho, the FWS and NMFS provided specific information as to the standard that would be the basis for the cooperative agreement under Section 6 to implement the term sheet. In that letter, the two agencies indicated that meeting the express statutory requirements in section 6 of the ESA for an adequate and active program for the conservation of the species, in this case, bull trout and salmon, would be required.

At the time the negotiations on the adjudication were completed, the bull trout was a listed species, but critical habitat had not been designated. The negotiations culminating in the final Term sheet were completed prior to designation of critical habitat.

(1) Benefits of Inclusion

Designation of critical habitat for bull trout in the Snake River Basin Adjudication area would provide for protection from ''destruction or adverse modification'' of designated critical habitat under section 7 of the Act. Without designation, a certain amount of habitat protection would be provided through the jeopardy standard. However, as noted earlier, based on our review of previous bull trout consultations under this standard, we have found little to indicate that there would be additional habitat protections generated by the designation beyond those provided through the jeopardy standard. There would be some educational benefits that would accrue from the designation. However, because of the conservation standard that will be the basis for the Section 6 agreement and the ensuing special management provisions which will be the result of that agreement, it is likely that any educational benefit would overlap with the incidental education that would occur as a result of the Section 6 agreement negotiation and the associated NEPA process. Finally, the Section 6 agreement, with its basis of conservation would likely require more, not less, protection of bull trout habitat, even including restoration and enhancement, both of which provide benefits in excess of those provide, by a critical habitat designation.

(2) Benefits of Exclusion

The primary benefit of exclusion is it preserves the Federal government's commitments to the parties to the adjudication. The Term sheet addressed many of the issues related to stream-flow and land management that would also be addressed by a critical habitat designation. The Section 6 agreement also provided the standard that the government would adhere to in their development of implementing agreements. Discretionary superimposition of requirements, in addition to those spelled out in the agreement, could be viewed as an act of bad faith, would undermine confidence in the government's commitments, and negatively impact future negotiations.

(3) Benefits of Exclusion Outweigh the Benefits of Inclusion

In considering the benefit of a critical habitat designation, and despite any factual circumstance related to meeting the conditions, the Secretary considered that benefits would accrue from a designation. She did this notwithstanding the general premise that in the case of bull trout, our actual consultation records demonstrated the jeopardy standard provided similar results to protection provided by critical habitat designation under the *Gifford Pinchot* definition. These protected conservation benefits, were weighed against the benefit of the Federal government avoiding even the appearance of bad faith in the Snake River Basin adjudication agreements. The Secretary determined that the consequences of the Federal government appearing to unilaterally add additional terms and conditions to an agreement after it was completed were significant and could negatively affect other ongoing and potential future negotiations. The benefit of avoiding even the appearance of bad faith was determined to greatly outweigh any real or speculative benefit conferred by the

regulatory protections of a critical habitat designation.

Waters Impounded Behind Dams (Reservoirs and Pools)

We are excluding those reservoirs, or pools impounded behind dams whose primary purpose is for flood control, energy production, or water supply for human consumption. Disruption of these functions could potentially compromise human health and safety in the case of reservoir where the reservoir provides flood control or drinking water, and in the case of energy production, would be consistent with the President's energy policy.

(1) Benefits of Inclusion

We identified two benefits of including reservoirs in the critical habitat designation: The additional protection afforded by the prohibition against adverse modification and the benefits associated with clearly delineating areas containing features essential to a species' conservation.

The principal benefit of any designated critical habitat is the requirement for consultation under section 7 of the Act for any activities having a Federal nexus that may affect critical habitat. Section 7 of the Act requires action agencies to avoid the destruction or adverse modification of critical habitat. Given the unique analytical framework for conducting section 7 consultations on the bull trout (*i.e.*, an analytical approach whereby the continued survival of the species is dependent upon maintaining functioning core habitat), the likelihood that a Federal action would result in adverse modification, without also jeopardizing the continued existence of the species, is low. Therefore we give this benefit little weight.

Designating critical habitat can educate the public and management agencies about the distribution of areas containing features essential to the conservation of a species. In areas lacking a bull trout-specific management plan (*e.g.*, many reservoirs) this can guide projects to avoid impacts to listed species and can help focus recovery efforts. We assign this benefit moderate weight.

(2) Benefits of Exclusion

We identified a number of possible benefits of excluding reservoirs from the critical habitat designation. First, to the extent designation would provide any additional protection of bull trout habitat, costs associated with that protection would be avoided. Since it is unlikely that a Federal action would result in adverse modification (which we have assumed to be small), without also jeopardizing the continued existence of the species, we believe the benefits of critical habitat are low, so it follows that by excluding these areas the benefits of exclusion are also low. However, those reservoirs that provide flood protection; even where there is a very small probability of flood control operations, increasing the risk of loss of human lives due to flooding is unacceptable. The benefit of avoiding the risk exceeds the benefit of the conservation values generated through reservoir operation changes. Equally, where a reservoir provides drinking water for people, the benefit of avoiding the risk, however small, of losing that water supply in terms of human health and safety is significant. And finally, where a reservoir provides for energy production the benefit of avoiding the risk, however small, of a reduction in energy is inconsistent with the President's energy policies. Therefore, we believe that the benefits of exclusion, given the risk, however small, to human health, safety, and energy are large, as we give this benefit a significant amount of weight.

Second, exclusion would reduce administrative costs of conducting section 7 consultations on bull trout critical habitat (see Section 3(5)(A) and Exclusions Under Section 4(b)(2) section above). We assign this benefit moderate weight.

(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion

The benefits of including reservoirs in the critical habitat designation consist of the prohibition against adverse modification and the educational benefits of wider knowledge among the public and management agencies about the distribution of areas containing features essential to the conservation of a species. Based on our analysis above we assign these benefits little to moderate weight.

The benefits of excluding reservoirs from the critical habitat designation include avoiding project modifications that would change existing flood protection, water delivery services, and energy production, and avoiding costs associated with preparing regulatory documents on critical habitat. Modification of reservoir operations as a result of critical habitat designation may result in an increased risk to the primary purpose of those reservoirs. For example, should a reservoir alter its capacity for floodwater storage due to an adverse modification determination, this may increase the risk of flooding. We have determined even a minor increase in the risk of flooding has consequences to human health and safety which outweigh the minor benefits of critical habitat. We assign an overriding benefit to the avoidance of increased flood risk. Avoiding diminishment or interruptions of a reservoir's ability to deliver drinking water also outweighs the benefit to the species of critical habitat designation, since the benefit to the species is small and the removing even a small risk to the disruption of drinking water drinking water supplies is a significant benefit. Furthermore, avoiding possible modifications to reservoir operations that reduces energy production is also a benefit in that it supports the President's energy policy through which we assign great weight.

Therefore, we have determined that the benefits of inclusion of the areas covered by reservoirs are small to moderate, while the benefits of exclusion are more significant. In short, the benefits of exclusion outweigh the benefits of inclusion. Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands, the exclusion will not result in the extinction of the bull trout. Where waters impounded are used for energy production, this exclusion is consistent with the President's energy policy. The Secretary exercises her discretion under section 4(b)(2) to exclude these areas from the designation.

Summary of Exclusions

We have reviewed the overall effect of the exclusion of the above-mentioned approved Conservation agreements with non-Federal landowners, Tribal lands, military installations, and the Nisqually National Wildlife Refuge, and other lands that we have excluded as described above, for bull trout and their essential habitat. We have determined that the benefits of excluding these areas outweigh the benefits of including them in this critical habitat designation. Designation of critical habitat in these areas would most likely have a negative effect on the recovery and conservation of bull trout. The removal of these lands from critical habitat designation, as a result of these exclusions, will not lead to the species' extinction.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and contain the PCEs may require special management considerations or protections. As we undertake the process of designating critical habitat for a species, we first evaluate lands

defined by those physical and biological features essential to the conservation of the species for inclusion in the designation pursuant to section 3(5)(A) of the Act. Secondly, we evaluate lands defined by those features to assess whether they may require special management considerations or protection. Within each area designated as critical habitat, the physical and biological features essential for the conservation of the bull trout may require some level of management and/or protection to avoid destruction or adverse modification of habitat essential to its conservation.

Critical Habitat Designation

We are designating critical habitat in 20 units. Critical habitat includes bull trout habitat in Idaho, Montana, Oregon, and Washington. Lands adjacent to designated critical habitat are under private, local government, State, Tribal, and Federal ownership. The areas we are designating as critical habitat constitute our best assessment of areas that: (1) Have documented occupancy within the last 20 years, (2) contain features essential to the conservation of the bull trout, and (3) are in need of special management, and (4) were not excluded under section 4(b)(2) of the Act. Military lands with an approved INRMP that provides benefits to the bull trout were not included in the designation per section 4(a)(3) of the Act.

Tables 1–5 summarize the distance (stream miles) and area (acres) of designated critical habitat by critical habitat unit, State, and land ownership.

TABLE 1.—STREAM/SHORELINE DISTANCE (MI/KM) DESIGNATED AS BULL TROUT CRITICAL HABITAT BY CRITICAL HABITAT UNIT

CH unit	Stream/shoreline miles	Stream/shoreline kilometers
1. Klamath River Basin	50	80
2. Clark Fork River Basin	1,136	1,828
3. Kootenai River Basin	56	91
4. Willamette River Basin	111	178
5. Hood River Basin	30	48
6. Deschutes River Basin	78	126
9. Umatilla-Walla Walla River Basins	218	350
10. Grande Ronde River Basin	308	496
11. Imnaha-Snake River Basins	92	148
12. Hells Canyon Complex	125	202
13. Malheur River Basin	38	60
14. Coeur d'Alene Lake Basin	124	199
19. Lower Columbia River Basin	94	152
20. Middle Columbia River Basin	188	302
22. Northeast Washington River Basins	25	40
23. Snake River Basin in Washington	68	109
25. Snake River	17	27
27. Olympic Peninsula	388	624
27. Olympic Peninsula (Marine)	419	674
28. Puget Sound	646	1,039
28. Puget Sound (Marine)	566	912
29. Saint Mary-Belly	37	59
Total	4,813	7,745

TABLE 2.—ACRES OF RESERVOIRS OR LAKES DESIGNATED AS BULL TROUT CRITICAL HABITAT BY CRITICAL HABITAT UNIT.

CH unit	Acres	Hectares
1. Klamath River Basin	24,610	9,959
2. Clark Fork River Basin	49,755	20,135
3. Kootenai River Basin	1,384	560
6. Deschutes River Basin	2,713	1,098
14. Coeur d'Alene Lake Basin	27,296	11,046
27. Olympic Peninsula	8,318	3,366
28. Puget Sound	25,035	10,131
29. Saint Mary-Belly	4,107	1,662
Total	143,218	57,958

TABLE 3.—STREAM/SHORELINE DISTANCE (MI/KM) DESIGNATED AS BULL TROUT CRITICAL HABITAT BY STATE

State	Stream/shoreline miles	Stream/shoreline kilometers
Idaho	294	474
Montana	1,058	1,703
Oregon	939	1,511
Oregon/Idaho	17	27
Washington	1,519	2,445
Washington (Marine)	985	1,585

TABLE 3.—STREAM/SHORELINE DISTANCE (MI/KM) DESIGNATED AS BULL TROUT CRITICAL HABITAT BY STATE—Continued

State	Stream/shoreline miles	Stream/shoreline kilometers
Total	4,812	7,745

TABLE 4.—ACRES OF RESERVOIRS OR LAKES DESIGNATED AS BULL TROUT CRITICAL HABITAT BY STATE

State	Acres	Hectares
Idaho	50,627	20,488
Montana	31,916	12,916
Oregon	27,322	11,057
Washington	33,353	13,497
Total	143,218	57,958

TABLE 5.—STREAM/SHORELINE DISTANCE (MI/KM) DESIGNATED AS BULL TROUT CRITICAL HABITAT BY OWNERSHIP

Land ownership	Stream/shoreline miles	Stream/shoreline kilometers
Federal	538	865
Federal/Private Mixed	24	38
Federal/State Mixed	6	10
Federal/Tribal Mixed	1	1
Private	3,587	5,773
State/Local Government Mixed	347	559
State/Private Mixed	69	111
Tribal	209	336
Tribal/Private Mixed	31	50
Tribal/State Mixed	1	2
Total	4,813	7,745

The lateral extent of critical habitat, for each designated stream reach, is the width of the stream channel as defined by its ordinary high-water line as defined by the U.S. Army Corps of Engineers (COE) in 33 CFR 329.11. This approach is consistent with the specific mapping requirements described in agency regulations at 50 CFR 424.12(c). In areas for which ordinary high-water has not been defined pursuant to 33 CFR 329.11, the width of the stream channel shall be defined by its bankfull elevation. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain (Rosgen, 1996) and is reached at a discharge which generally has a recurrence interval of 1 to 2 years on the annual flood series (Leopold *et al.*, 1992). Such an interval is commensurate with nearly all of the juvenile freshwater life phases of most salmon and steelhead ESUs. Therefore, it is reasonable to conclude that for an occupied stream reach this lateral extent is regularly ''occupied''. Moreover, the bankfull elevation can be readily discerned for a variety of stream reaches and stream types using recognizable water lines (*e.g.*, marks on rocks) or vegetation boundaries (Rosgen, 1996). Critical habitat extends from the ordinary high-water line as defined by the Corps in 33 CFR 329.11 and shall be used to determine the lateral extent of critical habitat. Adjacent floodplains are not designated as critical habitat. However, it should be recognized that the quality of aquatic habitat within stream channels is intrinsically related to the character of the floodplains and associated riparian zones, and human activities that occur outside the river channels can have demonstrable effects on physical and biological features of the aquatic environment (*i.e.*, critical habitat). In addition, human activities that occur within or adjacent to streams or stream reaches that flow into critical habitat can also have demonstrable effects on physical and biological features of designated reaches. The lateral extent of lakes and reservoirs is defined by the perimeter of the water body as mapped on standard 1:24,000 scale maps (comparable to the scale of a 7.5 minute USGS Quadrangle topographic map).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, recent decisions by the 5th and 9th Circuit Court of Appeals have invalidated this definition. Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is

proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once proposed species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the proposed species or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to proposed species or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report; while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR 402.14, as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, compliance with the requirements of section 7(a)(2) will be documented through the Service's issuance of: (1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or (2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid jeopardy to the listed species or destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where a new species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the bull trout or its designated critical habitat will require section 7 consultation under the Act. Activities on State, tribal, local or private lands requiring a Federal permit (such as a permit from the Corps under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) will also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local or private lands that are not federally-funded, authorized, or permitted, do not require section 7 consultations.

Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to the Bull Trout and Its Critical Habitat

Jeopardy Standard

Prior to and following designation of critical habitat, the Service has applied an analytical framework for bull trout jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of the bull trout.[1] The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the bull trout at the DPS scale in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population ot the survival and recovery of the species as a whole.

Adverse Modification Standard

The analytical framework described in the Director's December 9, 2004, memorandum is used to complete section 7(a)(2) analyses for Federal actions affecting bull trout critical habitat. The key factor related to the adverse modification determination is whether, with implementation of the

[1] (Core areas form the building blocks that provide for conserving the bull trout's evolutionary legacy as represented by major genetic groups. The draft *Bull Trout Recovery Plan* recognizes core areas as the population units that are necessary to provide for bull trout biological needs in relation to genetic and phenotypic diversity, and spreading the risk of extinction caused by stochastic events. Peer review of the draft *Bull Trout Recovery Plan* did not reveal deficiencies with this approach. A panel of scientists invited to participate in the bull trout 5-year review process concluded that core areas are appropriate units of analysis by which threats to the bull trout and recovery standards should be measured.)

proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. Generally, the conservation role of bull trout critical habitat units is to support viable core area populations.

It should be noted that in the 200 or so formal consultations completed since the bull trout was listed, most of the anticipated effects of proposed Federal actions on the species have not been biologically significant from a core area perspective, and if these actions were subject to the adverse modification standard described above, they would not likely violate it. Based on an analysis of 137 formal consultations conducted during the period 1998–2003, the following types of projects were proposed in bull trout-occupied habitat, in order of frequency (most to least): multiple project actions, grazing, road work, bridge work, habitat restoration, land and resource management plans, mining, hydropower, timber harvest, recreation, water diversion/irrigation, research, land exchange, flood control, erosion control, pipeline construction, predator control, landslide remediation, instream crossings, weed management, dredging, and levee repair.

However, at least one major Federal action involving significant modifications to natural flow patterns in designated critical habitat is currently in formal consultation, and it is likely (based on recent litigation patterns and outcomes) that the number of diversion-related Federal actions consulted on, some of which may occur in critical habitat, will increase substantially in the future. Water quality and quantity are significant factors (and primary constituent elements of bull trout critical habitat) influencing the viability of bull trout core areas. Given that context, it seems reasonable to predict that a few Federal actions will be found to adversely modify bull trout critical habitat; most of these actions would also probably constitute jeopardy.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species. All areas designated as critical habitat are determined to be essential to the conservation of the bull trout.

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the conservation value of critical habitat for the bull trout is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for the bull trout include, but are not limited to:

(1) Detrimental altering of the minimum flow or the natural flow regime of any of the designated stream segments. Possible actions would include groundwater pumping, impoundment, water diversion, and hydropower generation. We note that such flow alterations resulting from actions affecting tributaries of the designated stream reaches may also destroy or adversely modify critical habitat;

(2) Alterations to the designated stream segments that could indirectly cause significant and detrimental effects to bull trout habitat. Possible actions include vegetation manipulation, timber harvest, road construction and maintenance, prescribed fire, livestock grazing, off-road vehicle use, powerline or pipeline construction and repair, mining, and development. Riparian vegetation profoundly influences instream habitat conditions by providing shade, organic matter, root strength, bank stability, and large woody debris inputs to streams. These characteristics influence water temperature, structure and physical attributes (useable habitat space, depth, width, channel roughness, cover complexity), and food supply (Gregory *et al.* 1991; Sullivan *et al.* 2000). The importance of riparian vegetation and channel bank condition for providing rearing habitat for salmonids in general is well documented (*e.g.*, Bossu 1954 and Hunt 1969, cited in Beschta and Platts 1987; MBTSG 1998);

(3) Detrimental altering of the channel morphology of any of the designated stream segments. Possible actions would include channelization, impoundment, road and bridge construction, deprivation of substrate source, destruction and alteration of aquatic or riparian vegetation, reduction of available floodplain, removal of gravel or floodplain terrace materials, excessive sedimentation from mining, livestock grazing, road construction, timber harvest, off-road vehicle use, and other watershed and floodplain disturbances. We note that such actions in the upper watershed (beyond the riparian area) may also destroy or adversely modify critical habitat. For example, timber harvest activities and associated road construction in upland areas can lead to changes in channel morphology by altering sediment production, debris loading, and peak flows;

(4) Detrimental alterations to the water chemistry in any of the designated stream segments. Possible actions would include release of chemical or biological pollutants into the surface water or connected groundwater at a point source or by dispersed release (non-point);

(5) Proposed activities that are likely to result in the introduction, spread, or augmentation of nonnative aquatic species in any of the designated stream segments. Possible actions would include fish stocking; use of live bait fish; aquaculture; improper construction and operation of canals; and interbasin water transfers; and

(6) Proposed activities that are likely to create significant instream barriers to bull trout movement. Possible actions would include new water diversions, impoundments, and hydropower generation where effective fish passage facilities, mechanisms, or procedures are not provided.

We consider all of the units designated as critical habitat, as well as those that have been excluded or not included, to contain features essential to the conservation of the bull trout. All units are within the geographic range of the species, all were occupied by the species at the time of listing (based on observations made within the last 20 years), and are likely to be used by the bull trout, whether for foraging, migrating, overwintering, spawning, or rearing. Federal agencies already consult with us on activities in areas currently occupied by the bull trout, or if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of the bull trout.

If you have questions regarding whether specific activities will likely constitute destruction or adverse modification of critical habitat, contact the Field Supervisor of the nearest Fish and Wildlife Ecological Services Office. Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the Division of Endangered Species, U.S. Fish and Wildlife Service, 911 NE 11th Avenue, Portland, OR 97232–4181 (telephone 503/231–6158; facsimile 503/231–6243).

Economic Analysis

Section 4(b)(2)of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant

impacts of designating a particular area as critical habitat. We exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude areas from critical habitat when exclusion will result in the extinction of the species concerned.

Analysis of the Klamath River and Columbia River Populations

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on April 5, 2004 (69 FR 17634). We accepted comments on the draft analysis until May 5, 2004.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the bull trout. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

The analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are ''reasonably foreseeable'' including, but not limited to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. Accordingly, the analysis bases estimates on activities that are likely to occur within a 10-year time frame, from when the proposed rule became available to the public (November 30, 2002, 67 FR 71235). The 10-year time frame was chosen for the analysis because, as the time horizon for an economic analysis is expanded, the assumptions on which the projected number of projects and cost impacts associated with those projects become increasingly speculative. An exception to the 10-year analysis time horizon used in this analysis is for FERC licenses, which are renewed for up to 50 years. Accordingly, this analysis estimates the annualized costs of the expected impacts associated with section 7 bull trout consultations involving FERC re-licensing over a 50-year time horizon.

Costs can be expressed in terms of unit or river mile; both of these metrics are useful in describing economic impacts. On a cost per unit basis, the largest portion of forecast costs is expected to occur in Unit 4, the Willamette River Basin (18 percent). These costs are attributable to fish passage and temperature control projects and annual operating and maintenance and fish study costs at the Corp's facilities in the Upper Willamette River System (Dexter, Lookout Point, Hills Creek, and Blue River Dams). The next most costly unit is Unit 16, the Salmon River Basin (12 percent). Because this is the largest unit in terms of river miles and proportion of USFS-managed land, and because future USFS activities are expected to generate approximately 70 percent of the consultation activity, this unit bears the greatest number of future bull trout-related consultations. Therefore, the administrative costs account for a large portion of the costs in this unit. Together, these two units account for 30 percent (approximately $8.2 million) of forecast costs. The next three most costly units, Hells Canyon complex (Unit 12), and the Clark Fork River (Unit 2), and Malheur River (Unit 13) Basins, each account for 8 percent (a unit cost range of approximately $2.1 million to $2.3 million) of forecast costs. In total, these five units account for almost 55 percent of forecast costs (approximately $14.8 million).

Based on our analysis, we concluded that the designation of critical habitat for the Klamath River and Columbia River population segments would not result in a significant economic impact, and estimated the potential economic effects over a 10-year period would range from $200 to $260 million ($20 to $26 million per year) for bull trout. It is expected that Federal agencies will bear 70 percent of these costs. The total estimated costs associated with bull trout consultation is expected be $9.8 million annually, and total project modification costs are expected to range from $19.5 to $26.1 million annually. Although we do not find the economic costs to be significant, they were considered in balancing the benefits of including and excluding areas from critical habitat.

Analysis of the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River Populations

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The DEA was made available for public review on May 3, 2005 (70 FR 22835). We accepted comments on the DEA until June 2, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the conservation of bull trout. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. The economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs related to bull trout, and the analysis considers how small entities, including small businesses, organizations, and governments, may be affected by future bull trout conservation activities. In addition, this analysis considers the impacts of conservation activities on the energy industry and its customers. However, economic impacts to land-use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies.

The analysis examines activities taking place both within and adjacent to the designation. It estimates impacts based on activities that are ''reasonably foreseeable'' including, but not limited

to, activities that are currently authorized, permitted, or funded, or for which proposed plans are currently available to the public. The analysis estimates economic effects of activities from 1998 (year of the proposed rule for listing) through 2024 (20 years from the year of final critical habitat designation). The time frame for analysis was selected to emulate a reasonable future period for recovery of the species.

The time frame associated with each activity is important because as the time horizon for an economic analysis is expanded, the forecast of future projects becomes increasingly speculative. As a result, with the exception of hydroelectric and non-hydroelectric projects where some capital costs are spread over 50 years, this analysis relies primarily on a time frame of 20 years. The time frame for hydroelectric and non-hydroelectric projects is longer relative to other activities analyzed based on the nature of the activity. Whereas geographic and total projections of population and housing densities within a region become increasingly speculative over time, the known location and inevitability of hydroelectric dam re-licensing or other permitting provides sufficient information to estimate future costs associated with conservation measures at these facilities.

The Coastal-Puget Sound population represents about 99 percent of the costs, and these costs are co-extensive with listed salmon. The reason for this is that listed salmon species overlap with the geographic area of the Coastal-Puget Sound population of bull trout. There are no listed species of salmon or steelhead in the Jarbidge River or Saint Mary-Belly River populations. Also, in cases where there is an overlap of range between salmon and bull trout, no separation is made of these joint costs, and they are presented as ''impacts associated with co-extensive of salmon and bull trout conservation activities.''

For this critical habitat designation, the majority of the cost burden (about 75 percent) falls on the commercial sector. Based on the projected development from 2005 to 2024, bull trout conservation activities are anticipated to increase the total cost of commercial, residential, and mixed development by $26.2 million annually. Total prospective costs are $277.2 million applying a 7 percent discount rate. Other cost leading activities include Federal land management (13 percent), non-hydroelectric projects (11 percent), and hydroelectric projects (10 percent). In the Puget Sound Unit (Unit 28), costs associated with residential and commercial development are among the highest category of costs.

There are 83 watersheds in the Coastal-Puget Sound region that contain designated critical habitat. Of the 10 watersheds with the highest costs associated with co-extensive salmon and bull trout conservation activities, nine are within Unit 28, between the Skagit River in the north and the Puyallup River in the south, and seven of these contain significant development costs; not surprisingly, they encompass highly urbanized areas of Puget Sound. Together, these seven watersheds represent 48 percent of the total economic impact within designated critical habitat. Costs in the Middle Green River watershed are primarily attributable to conservation activities at the Howard Hansen Dam and the City of Tacoma's water diversion. High costs in the Baker River watershed are due primarily to the upper and lower Baker Dam, where significant capitals costs are expected associated with a fish passage project beginning in 2006. Together, these 10 watersheds in Coastal-Puget Sound represent 70 percent of the annualized economic impacts associated with lands designated as critical habitat.

Based on our analysis, we concluded that the designation of critical habitat for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River population segments would not result in a significant economic impact, and estimated the potential economic effects over a 20-year period would range from approximately $684 million, assuming a 7 percent discount rate, to approximately $1 billion, assuming a 3 percent discount rate. Costs are estimated to be $61.3 million per year.

Copies of the two final economic analyses with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section), or by downloading from the Internet at *http://www.fws.gov/pacific/bulltrout/.*

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this final rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the final rule clearly stated? (2) Does the final rule contain technical jargon that interferes with the clarity? (3) Does the format of the final rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the final rule? (5) What else could we do to make this final rule easier to understand?

Send a copy of any comments on how we could make this final rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but will not have an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude any area from critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to

require Federal agencies to provide a statement of factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect bull trout. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities.

The Columbia River and Klamath River populations of bull trout were federally-listed as threatened in June 1998. In fiscal years 1998 through 2002, we conducted 152 formal section 7 consultations and several hundred informal consultations with other Federal agencies, mainly the USFS, to ensure that their actions will not jeopardize the continued existence of the bull trout. Our economic analysis found that timber management, grazing, dam and reservoir operations, stream habitat improvement and fisheries restoration, road construction and maintenance, and flood control projects are the primary activities anticipated to take place within the area designated as critical habitat for the bull trout. To be conservative (*i.e.*, more likely to overstate impacts than understate them), we assumed in our economic analysis that a unique business entity would undertake each of the projected consultations in a given year. Therefore, the number of businesses affected annually is equal to the total annual number of consultations (both formal and informal).

Based on the economic analysis which looked at the critical habitat for bull trout, and including consultations on FERC relicensing of hydroelectric facilities, we estimated that in each year, there could be approximately 52 formal consultations involving bull trout, and it is expected that the USFS will constitute about 70 percent of the total number of formal consultations.

The Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations were federally listed as threatened in April 1999 (Jarbidge River) and November 1999 (Coastal-Puget Sound and St. Mary-Belly River), respectively. In fiscal years 1998 through 2004, we conducted 176 formal section 7 consultations and several hundred informal consultations with other Federal agencies to ensure that their actions will not jeopardize the continued existence of the bull trout. Approximately 77 percent of the past consultations have involved the Corps and FHA. The Corps regulates flood control and damage reduction efforts, as well as permits dredging and construction activities affecting waterways under authority provided by the Clean Water Act. Federal Highway Administration provides funding to many of the road and bridge projects administered by State departments of transportation. Projects that may impact streams with listed bull trout can result in a section 7 consultation with FHA as the action agency.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for small businesses that may be required to consult with us each year regarding their project's impact on bull trout and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy, or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those in their initial proposed form, would result in jeopardy, or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the final CHUs, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization implemented or licensed by Federal agencies;

(3) Regulation of timber harvest, grazing, mining, and recreation by the USFS and BLM;

(4) Road construction and maintenance, right-of-way designation, and regulation of agricultural activities;

(5) Hazard mitigation and post-disaster repairs funded by the FEMA; and

(6) Activities funded by the Environmental Protection Agency, U.S. Department of Energy, or any other Federal agency.

It is likely that a developer or other project proponent could modify a project or implement measures to protect bull trout. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, management of competing nonnative species, restoration of degraded habitat, and monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Corps permits, permits we may issue under section 10(a)(1)(B) of the Act, FHA funding for road improvements, hydropower licenses issued by the Federal Energy Regulatory Commission, and regulation of timber harvest, grazing, mining, and recreation by the USFS and BLM. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designate critical habitat for the bull trout is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions: it excludes ''a condition of federal assistance,'' and it excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, permits or that otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year that is, it is not a ''significant regulatory action''

under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. As such, Small Government Agency Plan is not required.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. Therefore, a takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. The rule will not increase or decrease the current restrictions on private property concerning take of the bull trout. Due to current public knowledge of the species' protection as a result of it being listed under the Act, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values will be affected by the critical habitat designation. While real estate market values may temporarily decline following designation due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term. Additionally, critical habitat designation does not preclude development of HCPs and issuances of incidental take permits. Owners of areas that are included in the designated critical habitat will continue to have opportunity to use their property in ways consistent with the survival and conservation of the bull trout.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in Washington, Idaho, Montana, Oregon, and Nevada. The designation of critical habitat in areas currently occupied by the bull trout imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than encouraging these governments to simply wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have designated critical habitat in accordance with the provisions of the Endangered Species Act. This final rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the bull trout.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

Outside the Tenth Circuit Court, we do not need to prepare environmental analyses as defined by NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis.

During our development of this critical habitat designation for the Columbia River and Klamath River populations of bull trout, we evaluated tribal lands to determine if they contain features are essential to the conservation of the species. We have designated critical habitat for portions of Ahtanum Creek, North Fork Ahtanum Creek, South Fork Ahtanum Creek, Yakima River, Clearwater Creek, Fish Lake Stream, unnamed tributary to Fish Lake Stream, Little Muddy Creek, Trappers Creek, Two Lakes Stream, West Fork Klickitat River, and Klickitat River within or adjacent to the Yakama Indian Reservation; the Umatilla River, Meacham Creek, and Squaw Creek within the Umatilla Reservation; Lake Coeur d'Alene within the Coeur d'Alene Reservation; a portion of the Columbia River adjacent to the Colville Indian Reservation; the Pend Oreille River and Calispell Creek within the Kalispell Indian Reservation; portions of Clearwater River, Middle Fork Clearwater River, North Fork Clearwater River, and South Fork Clearwater River, Lolo Creek, Clear Creek, and Dworshak Reservoir within or adjacent to the Nez Perce Indian Reservation; and portions of Dry Creek, Flathead Lake, the lower Flathead River, Jocko River, McDonald Lake, Middle Fork Jocko River, Mission Creek, Mission Reservoir, North Fork Jocko River, Post Creek, Saint Mary's Lake, and South Fork Jocko River on the Confederated Salish and Kootenai Tribes (CSKT) lands on the Flathead Indian Reservation.

Currently, the Yakama Nation, Coeur d'Alene, Kalispell, Nez Perce, CSKT, and Umatilla Tribes do not have resource management plans that provide protection or conservation for the bull trout and its habitat. The CSKT have a resource management plan addressing bull trout conservation that is being applied in the Jocko River watershed. However, as a result of our meetings with the Tribes on September 26, 2002, we mutually agreed to include habitat within the Jocko River watershed in this rule designating critical habitat.

We held government-to-government consultations with the Confederated Tribes of Warm Springs Reservation of Oregon (CTWS) to discuss their policy and position regarding the proposal. At these meetings, the CTWS provided us with documents pertaining to the Tribe's conservation activities which benefit the bull trout. These documents include their IRMP I and II, Water Code, Water Quality Standards, Implementation Plan for Water Quality, Water Resources Inventory, Streamside Management Plan, Field Guide to IRMP Standards and Best Management

Practices. They also provided us with information on specific actions they have taken that benefit the bull trout.

During our development of this critical habitat designation for the Jarbidge River, Coastal-Puget Sound, and Saint Mary-Belly River bull trout populations, we evaluated tribal lands to determine if they contain features that are essential to the conservation of the species. There are no tribal lands designated as critical habitat within the Jarbidge River population area. Within the Saint Mary-Belly River population, there are no tribal lands designated as critical habitat. Within the Coastal-Puget Sound population, we have designated critical habitat for portions of the Nooksack River and Puget Sound nearshore adjacent to the Lummi Indian Reservation; portion of the Nooksack River adjacent to the Nooksack Indian Reservation; portion of the Sauk River adjacent to the Sauk-Suiattle Indian Reservation; portions of the Snohomish River, and Puget Sound nearshore within or adjacent to the Tulalip Indian Reservation; portions of the Puyallup River and Puget Sound nearshore within or adjacent to the Puyallup Indian Reservation; portions of the Nisqually River within or adjacent to the Nisqually Indian Reservation; portions of the Elwha River and the Strait of Juan de Fuca nearshore within or adjacent to the Lower Elwha S'Klallam Indian Reservation; and a portion of the Chehalis River within or adjacent to the Chehalis Indian Reservation. Approximately 18 mi (29 km) of stream segments, 60 mi (96 km) of marine shoreline, and 962 ac (389 ha) on or adjacent to tribal lands are included in our critical habitat designation, and approximately 79 mi (127 km) of stream segments and 56 mi (90 km) of marine shoreline on or adjacent to tribal lands are excluded.

We will continue to work closely with tribes to manage essential features of bull trout habitat. We are committed to maintaining a positive working relationship with all of the tribes, and will work with them on developing resource management plans for tribal lands that include conservation measures for bull trout. We were required to prepare this critical habitat designation based on our analysis of whether habitat within these tribal reservation lands contain features essential to the conservation of the species and may require special management considerations or protection. Please refer to the Tribal Lands section under the Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act for a more detailed discussion.

References Cited

A complete list of all references cited in this final rule is available on request from the U.S. Fish and Wildlife Service, Branch of Endangered Species Office, Portland, OR (see **ADDRESSES** section).

Authors

The primary authors of this rule are the staff of the U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99'625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.95(e) by revising the entry for Bull Trout (*Salvelinus confluentus*) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Bull Trout (*Salvelinus confluentus*)

(1) *Locations of the designated critical habitat.* Critical habitat is designated in the following States and counties on the maps and as described below:

State	Counties
(i) Idaho	Adams, Benewah, Bonner, Boundary, Kootenai, Nez Perce, Shoshone, Washington.
(ii) Montana	Deer Lodge, Flathead, Glacier, Granite, Lake, Lewis and Clark, Lincoln, Mineral, Missoula, Powell, Ravalli, Sanders.
(iii) Oregon	Baker, Deschutes, Grant, Harney, Hood River, Jefferson, Klamath, Lake, Lane, Sherman, Umatilla, Union, Wallowa, Wasco.
(iv) Washington	Asotin, Benton, Clallam, Clark, Columbia, Cowlitz, Garfield, Grays Harbor, Island, Jefferson, King, Kittitas, Klickitat, Mason, Pend Oreille, Pierce, Skagit, Skamania, Snohomish, Stevens, Thurston, Walla Walla, Whatcom, Whitman, Yakima.

(2) *Topographic features included in the critical habitat designation.* Critical habitat includes the stream channels within the designated stream reaches and inshore extent of critical habitat for marine nearshore areas (the mean high high-water (MHHW) line), including tidally influenced freshwater heads of estuaries indicated on the maps below.

(i) Critical habitat includes the stream channels within the designated stream reaches, and includes a lateral extent as defined by the ordinary high-water line. In areas where ordinary high-water line has not been defined, the lateral extent will be defined by the bankfull elevation. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain and is reached at a discharge that generally has a recurrence interval of 1 to 2 years on the annual flood series. Critical habitat includes the stream channels within the designated stream reaches, and includes a lateral extent from the bankfull elevation on one bank to the bankfull elevation on the opposite bank. Bankfull elevation is the level at which water begins to leave the channel and move into the floodplain and is reached at a discharge that generally has a recurrence interval of 1 to 2 years on the annual flood series. If bankfull elevation is not evident on either bank, the ordinary high-water line must be used to determine the lateral extent of critical habitat. The lateral extent of designated lakes is defined by the perimeter of the water body as mapped on standard 1:24,000 scale topographic maps.

(ii) Critical habitat includes the inshore extent of critical habitat for marine nearshore areas (the MHHW line), including tidally influenced freshwater heads of estuaries. This refers to the average of all the higher high-water heights of the two daily tidal levels. Adjacent shoreline riparian areas, bluffs, and uplands are not designated as critical habitat. However, it should be recognized that the quality of marine habitat along shorelines is intrinsically related to the character of these adjacent features, and human activities that occur outside of the MHHW line can have major effects on physical and biological features of the marine environment. The offshore

extent of critical habitat for marine nearshore areas is based on the extent of the photic zone, which is the layer of water in which organisms are exposed to light. Critical habitat extends offshore to the depth of 33 ft (10 m) relative to the mean low low-water line (MLLW) (average of all the lower low-water heights of the two daily tidal levels). This equates to the average depth of the photic zone and is consistent with the offshore extent of the nearshore habitat identified under the ''Notice of Change to the Nation's Tidal Datums With the Adoption of a New National Tidal Datum Epoch Period of 1983 Through 2001''. This area between MHHW and minus 10 MLLW is considered the habitat most consistently used by bull trout in marine waters based on known use, forage fish availability, and ongoing migration studies, and captures geological and ecological processes important to maintaining these habitats. This area contains essential foraging habitat and migration corridors such as estuaries, bays, inlets, shallow subtidal areas, and intertidal flats.

(3) *Primary constituent elements needed for bull trout survival.* Within the designated critical habitat areas, the primary constituent elements (PCEs) for bull trout are those habitat components that are essential for the primary biological needs of foraging, reproducing, rearing of young, dispersal, genetic exchange, or sheltering. Note that only the PCEs described in paragraphs (e)(3)(i), (vi), (vii), and (viii) apply to marine nearshore waters identified as critical habitat. The PCEs are as follows:

(i) Water temperatures that support bull trout use. Bull trout have been documented in streams with temperatures from 32 to 72 °F (0 to 22 °C) but are found more frequently in temperatures ranging from 36 to 59 °F (2 to 15 °C). These temperature ranges may vary depending on bull trout life-history stage and form, geography, elevation, diurnal and seasonal variation, shade, such as that provided by riparian habitat, and local groundwater influence. Stream reaches with temperatures that preclude bull trout use are specifically excluded from designation;

(ii) Complex stream channels with features such as woody debris, side channels, pools, and undercut banks to provide a variety of depths, velocities, and instream structures;

(iii) Substrates of sufficient amount, size, and composition to ensure success of egg and embryo overwinter survival, fry emergence, and young-of-the-year and juvenile survival. This should include a minimal amount of fine substrate less than 0.25 inch (0.63 centimeter) in diameter.

(iv) A natural hydrograph, including peak, high, low, and base flows within historic ranges or, if regulated, currently operate under a biological opinion that addresses bull trout, or a hydrograph that demonstrates the ability to support bull trout populations by minimizing daily and day-to-day fluctuations and minimizing departures from the natural cycle of flow levels corresponding with seasonal variation: This rule finds that reservoirs currently operating under a biological opinion that addresses bull trout provides management for PCEs as currently operated;

(v) Springs, seeps, groundwater sources, and subsurface water to contribute to water quality and quantity as a cold water source;

(vi) Migratory corridors with minimal physical, biological, or water quality impediments between spawning, rearing, overwintering, and foraging habitats, including intermittent or seasonal barriers induced by high water temperatures or low flows;

(vii) An abundant food base including terrestrial organisms of riparian origin, aquatic macroinvertebrates, and forage fish; and

(viii) Permanent water of sufficient quantity and quality such that normal reproduction, growth, and survival are not inhibited.

(4) *Exclusions from the critical habitat designation.* Certain geographic areas are excluded from the critical habitat designation as described below in this paragraph (4).

(i) *3(5)(A) and Exclusions under section 4(b)(2) of the Act.* (A) *Habitat conservation plans.* We are excluding from the critical habitat designation any non-Federal lands covered by an incidental take permit for bull trout issued under section 10(a)(1)(B) of the Act on or before September 26, 2005, as long as such permit, or a conservation easement providing comparable conservation benefits, remains legally operative on such lands. These excluded areas are covered by habitat conservation plans (HCPs). They include lands and waters covered by the Washington Department of Natural Resources HCP, the Plum Creek Native Fish HCP/Stimson Lumber Company HCP, the Tacoma Water Green River HCP, the Green Diamond Resources Company HCP, and the City of Seattle Cedar River Watershed HCP.

(B) *Tribal lands.* The following tribal lands contain stream segments or marine nearshore habitat areas that have been excluded from designated critical habitat pursuant to section 4(b)(2) of the Act: Tribal lands of the Blackfeet Nation, Swinomish Tribe, Quinault Indian Nation, Muckleshoot Tribe, Jamestown S'Klallam Tribe, Hoh Tribe, Skokomish, and Confederated Tribes of Warm Springs Reservation of Oregon.

(C) *Federal lands.* The following Federal lands contain stream segments or marine nearshore habitat areas that have been excluded from designated critical habitat pursuant to section 4(a)(3) of the Act: Lands within the Nisqually National Wildlife Refuge; the Washington State Forest Practices Rules and Forest Practices Regulations for Bull Trout; the Lewis Hydroelectric Project Conservation Easements; the Snake River Basin Adjudication; the Northwest Forest Plan Aquatic Conservation Strategy; the Interim Strategy for Managing Anadromous-Fish-Producing Watersheds; the Federal Columbia River Power System; the Clark Fork River from Missoula to Butte, MT; the Middle Fork of the Boise River; the Interior Columbia Basin Ecosystem Management Project; the Southeast Oregon Resource Management Plan; the Southwest Idaho Land and Resource Management Plan; and waters impounded behind dams whose primary purpose is for flood control or water supply for human consumption (reservoirs and pools).

(ii) *Non-Inclusions under section 4(a)(3) of the Act.* (A) *Military lands.* The following military lands contain stream segments or marine nearshore habitat areas that have been excluded from designated critical habitat pursuant to section 4(a)(3) of the Act: Bayview Acoustic Research Detachment, Naval Surface Warfare Center, ID; Naval Radio Station, Jim Creek, WA; Naval Station, Everett, WA; Naval Air Station, Whidbey Island, WA; the Naval Under Sea Warfare Center Division, Newport, WA (Dabob Bay and Crescent Harbor), Keyport facilities and Fort Lewis, WA.

(B) [Reserved]

(5) The designated critical habitat units for bull trout are set forth in the text and depicted on the maps below.

(6) An index map of designated critical habitat for the Klamath River, Columbia River, Olympic Peninsula, Puget Sound, and Saint Mary-Belly bull trout populations follows:

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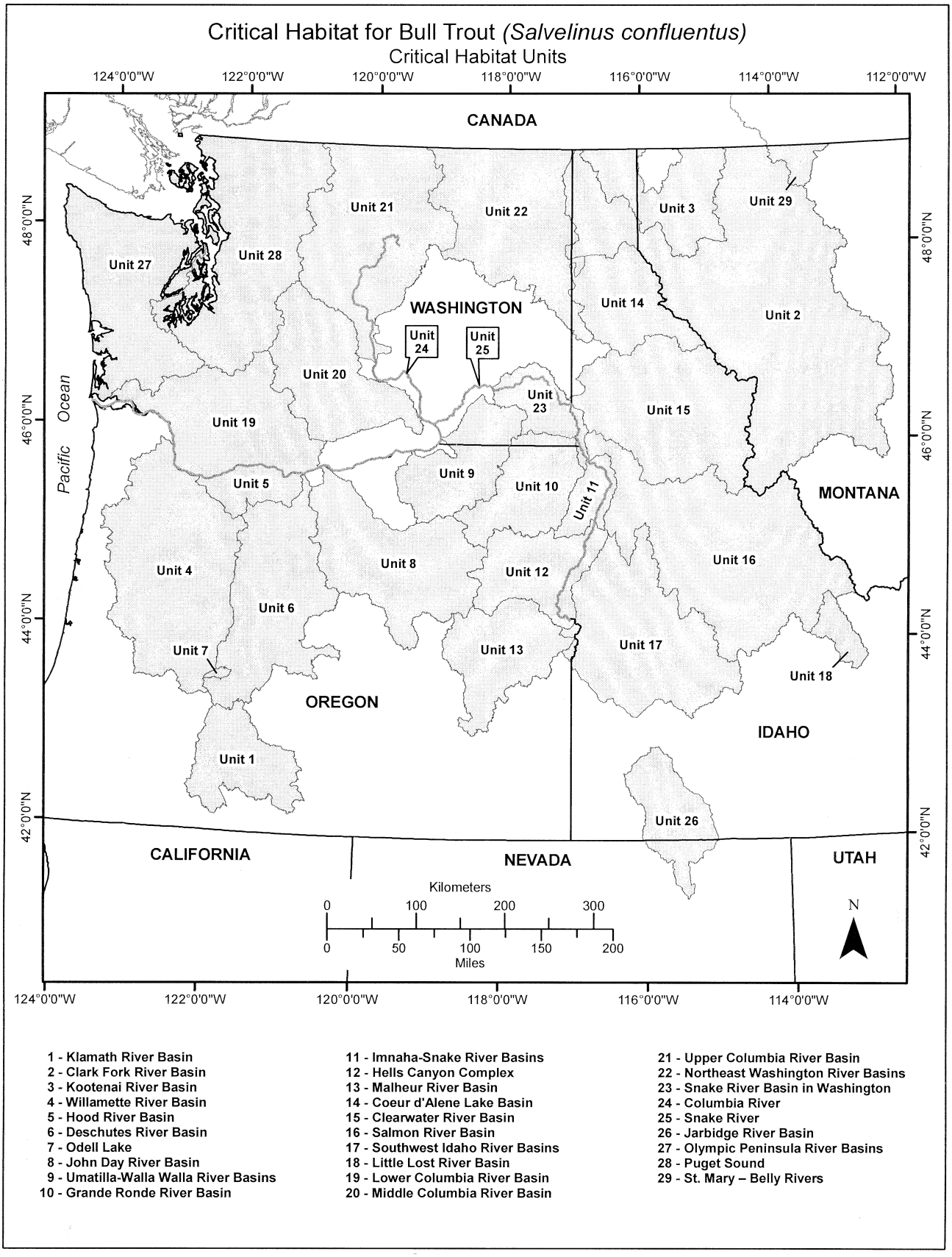


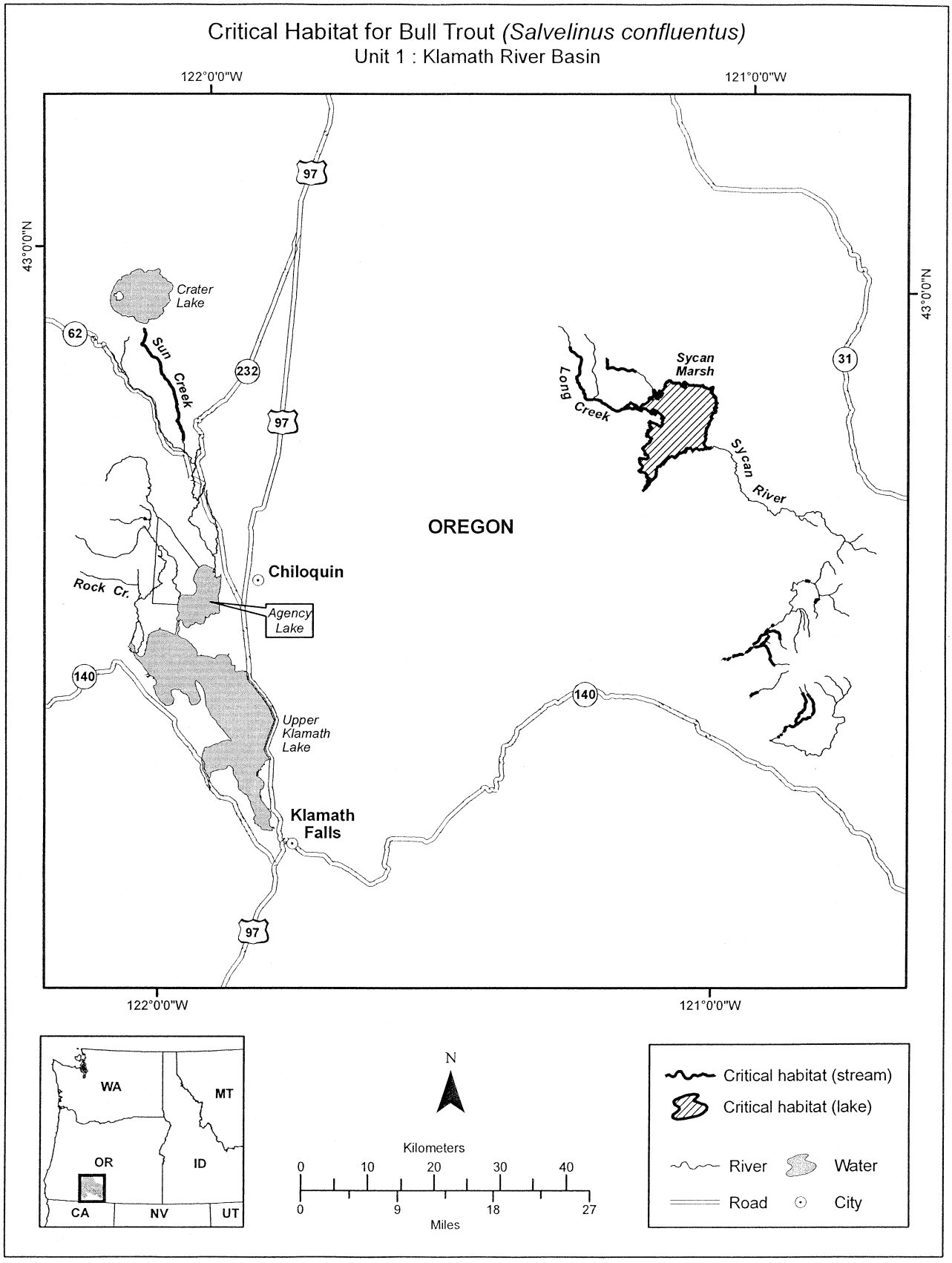
1 - Klamath River Basin
2 - Clark Fork River Basin
3 - Kootenai River Basin
4 - Willamette River Basin
5 - Hood River Basin
6 - Deschutes River Basin
7 - Odell Lake
8 - John Day River Basin
9 - Umatilla-Walla Walla River Basins
10 - Grande Ronde River Basin
11 - Imnaha-Snake River Basins
12 - Hells Canyon Complex
13 - Malheur River Basin
14 - Coeur d'Alene Lake Basin
15 - Clearwater River Basin
16 - Salmon River Basin
17 - Southwest Idaho River Basins
18 - Little Lost River Basin
19 - Lower Columbia River Basin
20 - Middle Columbia River Basin
21 - Upper Columbia River Basin
22 - Northeast Washington River Basins
23 - Snake River Basin in Washington
24 - Columbia River
25 - Snake River
26 - Jarbidge River Basin
27 - Olympic Peninsula River Basins
28 - Puget Sound
29 - St. Mary – Belly Rivers

(7) Unit 1: Klamath River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Boulder Creek	42.517 N.	120.951 W.	42.495 N.	120.884 W.
Brownsworth Creek	42.392 N.	120.913 W.	42.469 N.	120.854 W.
Coyote Creek	42.854 N.	121.158 W.	42.893 N.	121.246 W.
Deming Creek	42.448 N.	120.953 W.	42.486 N.	120.885 W.
Dixon Creek	42.518 N.	120.937 W.	42.532 N.	120.923 W.
Leonard Creek	42.413 N.	120.867 W.	42.465 N.	120.864 W.
Long Creek	42.826 N.	121.209 W.	42.933 N.	121.338 W.
North Fork Sprague River	42.497 N.	121.008 W.	42.557 N.	120.839 W.
Sheepy Creek	42.534 N.	120.931 W.	42.514 N.	120.890 W.
Sun Creek	42.735 N.	122.008 W.	42.898 N.	122.096 W.
Sycan Marsh	Located at		42.816 N.	121.124 W.
Threemile Creek	42.642 N.	122.065 W.	42.640 N.	122.138 W.

(ii) Map of Unit 1, Klamath River Basin, follows:



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(8) Unit 2: Clark Fork River Basin.

(ii) Critical habitat is designated on the water bodies listed in the following table:

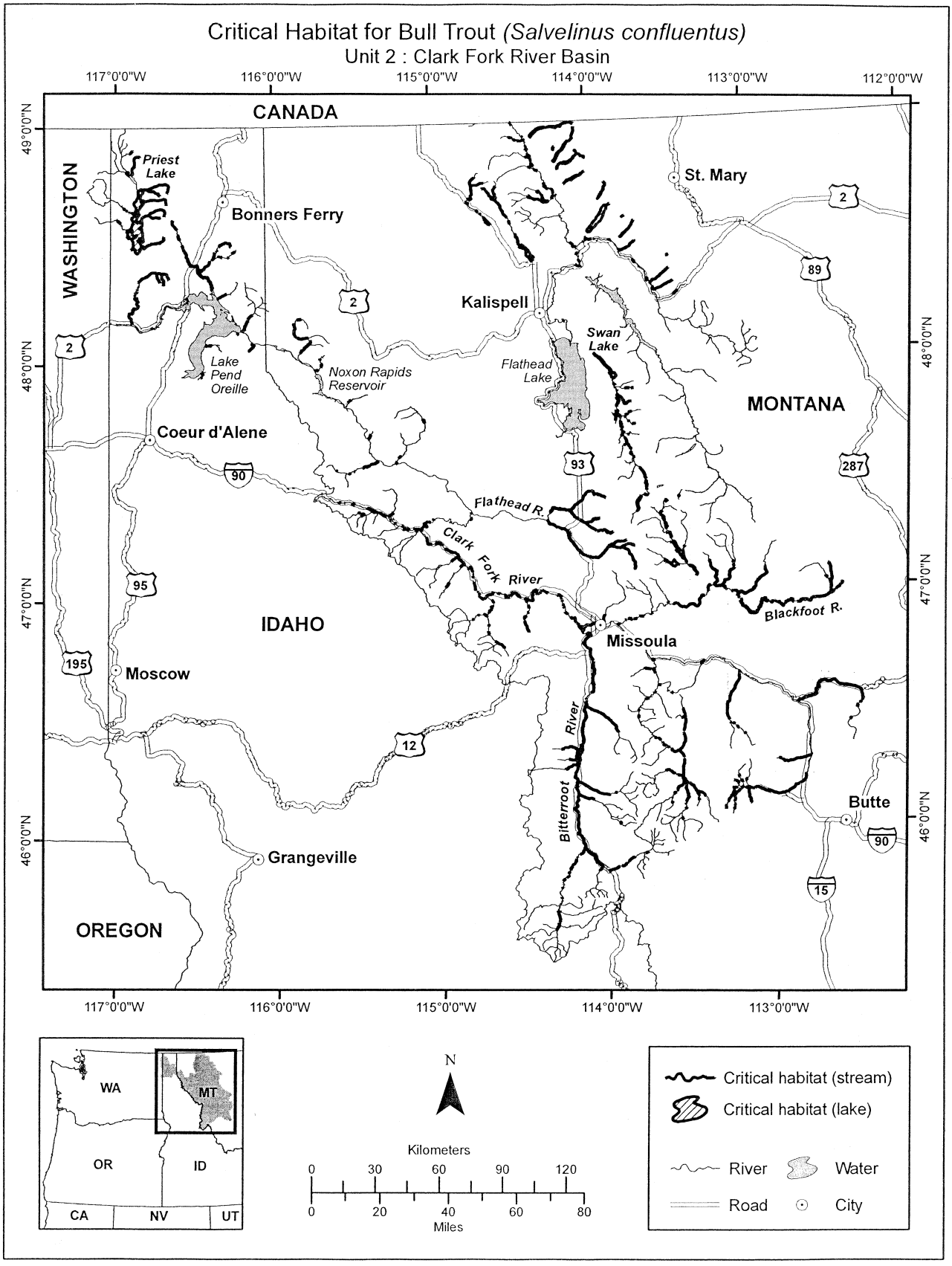
Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Akokala Cr	48.881 N.	114.198 W.	48.892 N.	114.191 W.
Akokala Lake	Located at		48.879 N.	114.198 W.
Arrow Lake	Located at		48.706 N.	113.884 W.
Barker Cr	46.163 N.	113.115 W.	46.100 N.	113.115 W.
Bear Creek	48.234 N.	113.566 W.	48.296 N.	113.384 W.
Beaver Cr	46.472 N.	113.493 W.	46.468 N.	113.555 W.
Belmont Cr	46.954 N.	113.569 W.	47.061 N.	113.681 W.
Big Cr	47.378 N.	115.384 W.	47.364 N.	115.444 W.
Big Cr, M Fk	47.364 N.	115.444 W.	47.312 N.	115.492 W.
Big Cr, W Fk	47.364 N.	115.444 W.	47.350 N.	115.544 W.
Bitterroot River	46.861 N.	114.118 W.	45.944 N.	114.128 W.
Blackfoot River	46.870 N.	113.889 W.	47.011 N.	112.476 W.
Blodgett Cr	46.312 N.	114.145 W.	46.248 N.	114.453 W.
Boulder Cr	46.478 N.	113.237 W.	46.343 N.	113.076 W.
Bowman Cr	48.906 N.	114.117 W.	48.974 N.	114.063 W.
Bowman Lake	Located at		48.870 N.	114.157 W.
Brewster Cr	46.612 N.	113.653 W.	46.582 N.	113.587 W.
Bull River	48.036 N.	115.844 W.	48.109 N.	115.782 W.
Burnt Fork Creek	46.542 N.	114.099 W.	46.304 N.	113.837 W.
Cable Cr	46.172 N.	113.180 W.	46.196 N.	113.213 W.
Cache Cr	46.814 N.	114.639 W.	46.726 N.	114.758 W.
Camas Cr	48.690 N.	113.901 W.	48.738 N.	113.883 W.
Cedar Cr	47.178 N.	114.862 W.	47.049 N.	115.043 W.
Cedar Creek	48.880 N.	116.959 W.	48.909 N.	116.885 W.
Cerulean Lake	Located at		48.872 N.	114.057 W.
Chicken Cr	45.601 N.	114.313 W.	45.621 N.	114.403 W.
Clark Fork River	47.366 N.	114.776 W.	46.870 N.	113.889 W.
Clearwater Lake	Located at		47.385 N.	113.558 W.
Clearwater R, W Fk	47.256 N.	113.550 W.	47.287 N.	113.744 W.
Clearwater River	47.107 N.	113.427 W.	47.390 N.	113.561 W.
Coal Cr	48.690 N.	114.193 W.	48.698 N.	114.494 W.
Coal Cr, S Fk	48.680 N.	114.345 W.	48.674 N.	114.471 W.
Cold Cr	47.584 N.	113.756 W.	47.562 N.	113.810 W.
Copper Cr	47.007 N.	112.555 W.	47.060 N.	112.752 W.
Cottonwood Cr	47.025 N.	113.281 W.	47.161 N.	113.345 W.
Cyclone Cr	48.665 N.	114.238 W.	48.712 N.	114.391 W.
Cyclone Lake	Located at		48.706 N.	114.297 W.
Deer Cr	45.595 N.	114.321 W.	45.570 N.	114.509 W.
Deer Cr	47.208 N.	113.529 W.	47.249 N.	113.688 W.
Deer Cr	47.377 N.	115.359 W.	47.326 N.	115.389 W.
Doctor Lake	Located at		47.404 N.	113.480 W.
Dry Cr	47.305 N.	114.064 W.	47.259 N.	113.903 W.
Dunham Cr	47.103 N.	113.155 W.	47.238 N.	113.316 W.
East Fork Bitterroot River	45.944 N.	114.128 W.	45.911 N.	113.595 W.
East River	48.353 N.	116.852 W.	48.371 N.	116.819 W.
Elk Cr	47.544 N.	113.741 W.	47.480 N.	113.856 W.
Finley Cr	47.125 N.	113.560 W.	47.120 N.	113.649 W.
Fish Cr	47.004 N.	114.699 W.	46.927 N.	114.696 W.
Fish Cr, S Fk	46.927 N.	114.696 W.	46.753 N.	114.571 W.
Fish Cr, W Fk	46.927 N.	114.696 W.	46.812 N.	114.890 W.
Fishtrap Cr	47.713 N.	115.058 W.	47.817 N.	115.144 W.
Fitzsimmons Cr	48.735 N.	114.733 W.	48.752 N.	114.618 W.
Flathead River	48.061 N.	114.127 W.	48.468 N.	114.069 W.
Flint Cr	46.654 N.	113.145 W.	46.478 N.	113.237 W.
Foster Cr	46.164 N.	113.120 W.	46.283 N.	113.109 W.
Fred Burr Creek	46.365 N.	114.131 W.	46.357 N.	114.315 W.
Gilbert Cr	46.682 N.	113.666 W.	46.648 N.	113.818 W.
Goat Cr	47.749 N.	113.828 W.	47.773 N.	113.694 W.
Gold Creek	47.971 N.	116.454 W.	47.954 N.	116.451 W.
Granite Creek	48.087 N.	116.427 W.	48.060 N.	116.329 W.
Granite Creek	48.639 N.	116.863 W.	48.700 N.	117.029 W.
Graves Cr	47.682 N.	115.409 W.	47.718 N.	115.380 W.
Grouse Creek	48.403 N.	116.477 W.	48.483 N.	116.228 W.
Harrison Cr	48.529 N.	113.750 W.	48.574 N.	113.701 W.
Harrison Lake	Located at		48.516 N.	113.771 W.
Harvey Cr	46.707 N.	113.372 W.	46.581 N.	113.573 W.
Hughes Cr	45.621 N.	114.303 W.	45.667 N.	114.021 W.

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Hughes Fork	48.805 N.	116.923 W.	48.946 N.	117.023 W.
Indian Creek	48.610 N.	116.836 W.	48.634 N.	116.789 W.
Jim Cr	47.648 N.	113.792 W.	47.575 N.	113.856 W.
Jocko R	47.322 N.	114.304 W.	47.201 N.	113.924 W.
Jocko R, M Fk	47.201 N.	113.924 W.	47.203 N.	113.761 W.
Jocko R, N Fk	47.201 N.	113.924 W.	47.226 N.	113.816 W.
Jocko R, S Fk	47.195 N.	113.852 W.	47.104 N.	113.766 W.
Johnson Cr	48.139 N.	116.229 W.	48.131 N.	116.225 W.
Kalispell Creek	48.567 N.	116.921 W.	48.626 N.	117.134 W.
Kintla Cr	48.975 N.	114.250 W.	48.986 N.	114.063 W.
Kintla Lake	Located at		48.966 N.	114.297 W.
Lake Alva	Located at		47.314 N.	113.582 W.
Lake Inez	Located at		47.270 N.	113.566 W.
Lake Isabel	Located at		48.422 N.	113.493 W.
Lake McDonald	Located at		48.576 N.	113.932 W.
Landers Fk	46.965 N.	112.562 W.	47.099 N.	112.566 W.
Lightning Creek	48.140 N.	116.191 W.	48.353 N.	116.175 W.
Lincoln Cr	48.592 N.	113.766 W.	48.595 N.	113.758 W.
Lincoln Lake	Located at		48.591 N.	113.770 W.
Lindbergh Lake	Located at		47.359 N.	113.731 W.
Lion Cr	47.681 N.	113.815 W.	47.670 N.	113.710 W.
Lion Creek	48.736 N.	116.831 W.	48.725 N.	116.672 W.
Little Blackfoot R	46.515 N.	112.797 W.	46.341 N.	112.465 W.
Little Joe Cr	47.297 N.	115.120 W.	47.270 N.	115.140 W.
Logging Cr	48.784 N.	114.002 W.	48.776 N.	114.019 W.
Logging Lake	Located at		48.756 N.	114.077 W.
Lost Cr, S Fk	47.873 N.	113.824 W.	47.869 N.	113.736 W.
Lower Quartz Lake	Located at		48.810 N.	114.170 W.
McDonald Cr	48.632 N.	113.868 W.	48.646 N.	113.847 W.
McDonald Lake	Located at		47.421 N.	113.976 W.
Meadow Cr	46.157 N.	113.439 W.	46.092 N.	113.443 W.
Middle Fork East River	48.371 N.	116.819 W.	48.362 N.	116.659 W.
Middle Fork Flathead River	48.468 N.	114.069 W.	47.996 N.	113.057 W.
Middle Quartz Lake	Located at		48.822 N.	114.141 W.
Mill Creek	46.348 N.	114.152 W.	46.312 N.	114.286 W.
Mission Cr	47.354 N.	114.285 W.	47.320 N.	113.988 W.
Mission Reservoir	Located at		47.321 N.	114.005 W.
Monture Cr	47.020 N.	113.235 W.	47.301 N.	113.249 W.
Moose Meadow Cr	46.139 N.	113.591 W.	46.078 N.	113.635 W.
Morrell Cr	47.141 N.	113.460 W.	47.342 N.	113.471 W.
North Fork Blackfoot River	46.985 N.	113.129 W.	47.197 N.	112.886 W.
North Fork Flathead River	48.468 N.	114.069 W.	49.000 N.	114.474 W.
North Fork Grouse Creek	48.452 N.	116.373 W.	48.502 N.	116.265 W.
North Fork Indian Creek	48.634 N.	116.789 W.	48.627 N.	116.691 W.
North Gold Creek	47.974 N.	116.452 W.	47.975 N.	116.426 W.
Nyack Creek	48.458 N.	113.804 W.	48.489 N.	113.700 W.
Ole Cr	48.283 N.	113.598 W.	48.315 N.	113.463 W.
Overwhich Cr	45.675 N.	114.307 W.	45.717 N.	114.080 W.
Owl Cr	47.115 N.	113.441 W.	47.115 N.	113.502 W.
Pack River	48.320 N.	116.382 W.	48.613 N.	116.634 W.
Park Cr	48.310 N.	113.613 W.	48.369 N.	113.490 W.
Park Cr	48.422 N.	113.496 W.	48.421 N.	113.505 W.
Petty Cr	46.992 N.	114.446 W.	46.850 N.	114.438 W.
Piper Cr	47.675 N.	113.815 W.	47.637 N.	113.844 W.
Placid Cr	47.116 N.	113.541 W.	47.187 N.	113.692 W.
Placid Lake	Located at		47.119 N.	113.522 W.
Post Creek	47.360 N.	114.168 W.	47.410 N.	113.935 W.
Priest Lake	Located at		48.481 N.	116.875 W.
Priest River	48.178 N.	116.892 W.	48.353 N.	116.852 W.
Prospect Cr	47.592 N.	115.358 W.	47.569 N.	115.676 W.
Quartz Cr	48.815 N.	114.165 W.	48.839 N.	114.003 W.
Quartz Lake	Located at		48.826 N.	114.100 W.
Racetrack Cr	46.285 N.	112.729 W.	46.279 N.	112.949 W.
Rainbow Cr	48.855 N.	114.053 W.	48.869 N.	114.052 W.
Rainy Lake	Located at		47.340 N.	113.593 W.
Ranch Cr	46.583 N.	113.678 W.	46.468 N.	113.577 W.
Rattlesnake Cr	46.867 N.	113.985 W.	47.098 N.	113.909 W.
Red Meadow Cr	48.805 N.	114.324 W.	48.753 N.	114.565 W.
Rock Cr, E Fk	46.200 N.	113.499 W.	46.021 N.	113.319 W.
Rock Cr, M Fk	46.223 N.	113.521 W.	45.949 N.	113.523 W.
Rock Cr, Ross Fk	46.224 N.	113.525 W.	46.034 N.	113.779 W.

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Rock Cr, W Fk	46.223 N.	113.521 W.	46.144 N.	113.721 W.
Rock Creek	46.725 N.	113.682 W.	46.223 N.	113.521 W.
Rock Creek	47.975 N.	115.742 W.	48.040 N.	115.676 W.
Saint Mary's Lake	Located at		47.261 N.	113.919 W.
Salmon Lake	Located at		47.099 N.	113.406 W.
Seeley Lake	Located at		47.187 N.	113.505 W.
Skalkaho Cr	46.220 N.	114.162 W.	46.057 N.	113.807 W.
Sleeping Child Cr	46.162 N.	114.159 W.	46.033 N.	113.814 W.
Soldier Creek	48.503 N.	116.838 W.	48.547 N.	116.698 W.
Soup Cr	47.837 N.	113.843 W.	47.812 N.	113.751 W.
South Boulder Cr	46.441 N.	113.214 W.	46.330 N.	113.219 W.
South Fork Bull River	48.109 N.	115.782 W.	48.152 N.	115.784 W.
South Fork Granite Creek	48.700 N.	117.029 W.	48.761 N.	117.147 W.
South Fork Indian Creek	48.634 N.	116.789 W.	48.624 N.	116.716 W.
South Fork Lion Creek	48.743 N.	116.797 W.	48.716 N.	116.718 W.
Squeezer Cr	47.750 N.	113.815 W.	47.717 N.	113.727 W.
St Regis R	47.297 N.	115.089 W.	47.427 N.	115.741 W.
Stillwater R	48.604 N.	114.655 W.	48.789 N.	114.685 W.
Stony Cr	46.348 N.	113.603 W.	46.283 N.	113.771 W.
Storm Lake Cr	46.169 N.	113.153 W.	46.075 N.	113.267 W.
Sullivan Springs	48.088 N.	116.411 W.	48.084 N.	116.387 W.
Swan Lake	Located at		47.968 N.	113.910 W.
Swan River	47.928 N.	113.880 W.	47.295 N.	113.782 W.
Swift Cr	48.481 N.	114.424 W.	48.654 N.	114.550 W.
Swift Cr, E Fk	48.687 N.	114.582 W.	48.756 N.	114.583 W.
Swift Cr, W Fk	48.654 N.	114.550 W.	48.723 N.	114.667 W.
Tarlac Creek	48.393 N.	116.737 W.	48.349 N.	116.717 W.
The Thorofare	48.740 N.	116.842 W.	48.766 N.	116.864 W.
Thompson R	47.576 N.	115.240 W.	47.713 N.	115.058 W.
Trail Creek	48.924 N.	114.386 W.	48.934 N.	114.534 W.
Trapper Creek	48.796 N.	116.896 W.	48.877 N.	116.846 W.
Trestle Creek	48.283 N.	116.352 W.	48.352 N.	116.234 W.
Trout Cr	47.143 N.	114.829 W.	47.004 N.	114.992 W.
Trout Lake	Located at		48.677 N.	113.912 W.
Twelvemile Cr	47.350 N.	115.291 W.	47.465 N.	115.324 W.
Twin Creek	48.094 N.	116.129 W.	48.063 N.	116.151 W.
Twin Lakes Cr	46.169 N.	113.152 W.	46.056 N.	113.226 W.
Two Mouth Creek	48.688 N.	116.836 W.	48.674 N.	116.676 W.
Uleda Creek	48.388 N.	116.707 W.	48.339 N.	116.694 W.
Upper Kintla Lake	Located at		48.974 N.	114.173 W.
Upper Priest River	48.799 N.	116.911 W.	49.000 N.	116.936 W.
Upper Stillwater Lake	Located at		48.587 N.	114.636 W.
Upper Whitefish Lake	Located at		48.687 N.	114.578 W.
Upper Willow Cr	46.331 N.	113.542 W.	46.566 N.	113.522 W.
Vermilion R	47.833 N.	115.535 W.	47.869 N.	115.409 W.
Wahlquist Cr	46.501 N.	113.776 W.	46.531 N.	113.843 W.
Warm Springs Cr	45.860 N.	114.025 W.	45.726 N.	114.057 W.
Warm Springs Cr	46.210 N.	112.767 W.	46.261 N.	113.137 W.
West Fork Bitterroot River	45.944 N.	114.128 W.	45.461 N.	114.341 W.
West Gold Creek	47.954 N.	116.451 W.	47.944 N.	116.477 W.
Whale Cr	48.849 N.	114.352 W.	48.851 N.	114.593 W.
Whitefish Lake	Located at		48.455 N.	114.387 W.
Woodward Cr	47.777 N.	113.845 W.	47.767 N.	113.879 W.
Woodward Cr, S Fk	47.754 N.	113.857 W.	47.717 N.	113.857 W.

(ii) Map of Unit 2, Clark Fork River Basin, follows:

BILLING CODE 4310–55–P

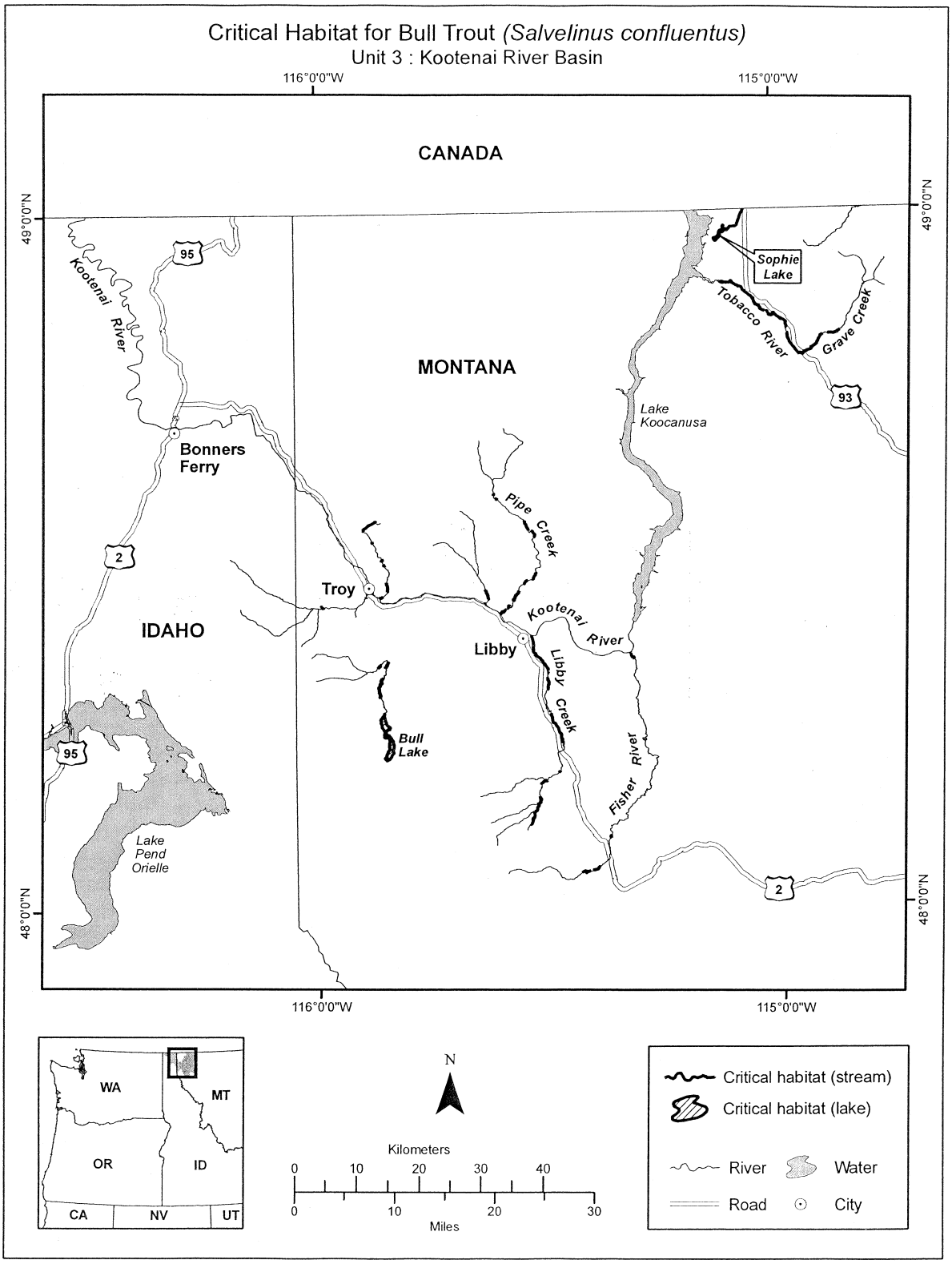

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 2 : Clark Fork River Basin
117°0'0"W
116°0'0"W
115°0'0"W
114°0'0"W
113°0'0"W
112°0'0"W
49°0'0"N
48°0'0"N
47°0'0"N
46°0'0"N
CANADA
WASHINGTON
IDAHO
MONTANA
OREGON
Priest Lake
Bonners Ferry
St. Mary
Kalispell
Swan Lake
Flathead Lake
Lake Pend Oreille
Noxon Rapids Reservoir
Coeur d'Alene
Flathead R.
Clark Fork River
Blackfoot R.
Missoula
Moscow
Bitterroot River
Butte
Grangeville
2
89
90
93
287
95
195
12
15
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 30 60 90 120
0 20 40 60 80
Miles
Critical habitat (stream)
Critical habitat (lake)
River
Water
Road
City

(9) Unit 3: Kootenai River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Bull Lake	Located at		48.218 N.	115.853 W.
Callahan Cr	48.435 N.	116.012 W.	48.458 N.	115.881 W.
Fisher R	48.366 N.	115.323 W.	48.070 N.	115.374 W.
Grave Cr	48.798 N.	114.952 W.	48.927 N.	114.750 W.
Keeler Cr	48.360 N.	115.851 W.	48.331 N.	116.006 W.
Lake Creek	48.360 N.	115.851 W.	48.283 N.	115.858 W.
Libby Creek	48.393 N.	115.537 W.	48.112 N.	115.552 W.
O'Brien Cr	48.448 N.	115.866 W.	48.557 N.	115.862 W.
Phillips Cr	48.971 N.	115.104 W.	49.000 N.	115.062 W.
Pipe Cr	48.424 N.	115.606 W.	48.674 N.	115.647 W.
Poorman Creek	48.149 N.	115.526 W.	48.123 N.	115.631 W.
Quartz Cr	48.438 N.	115.638 W.	48.573 N.	115.689 W.
Sophie Lake	Located at		48.962 N.	115.116 W.
Tobacco R	48.897 N.	115.126 W.	48.798 N.	114.952 W.
West Fisher Creek	48.070 N.	115.374 W.	48.050 N.	115.594 W.

(ii) Map of Unit 3, Kootenai River Basin, follows:

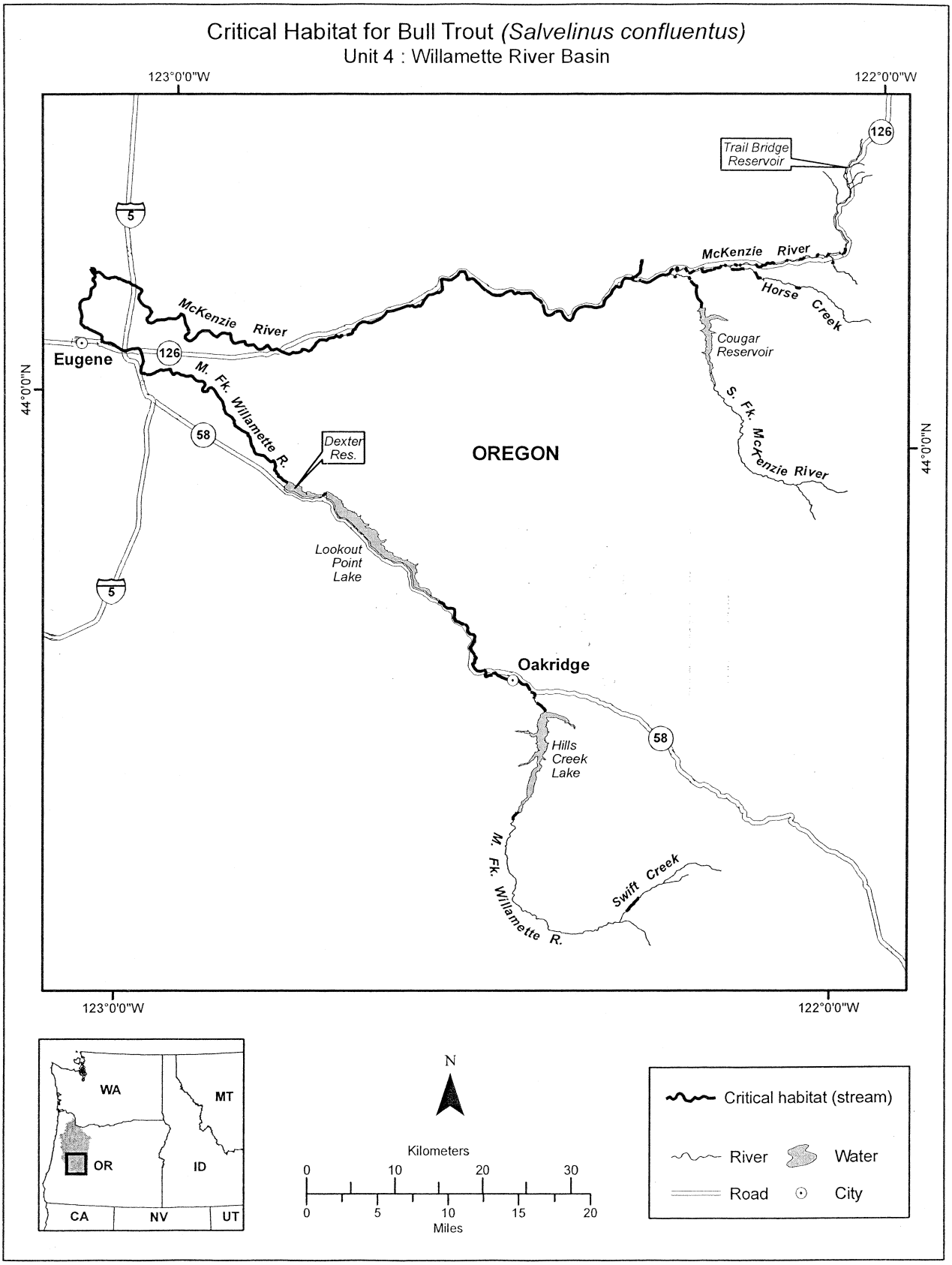

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 3 : Kootenai River Basin
116°0'0"W
115°0'0"W
49°0'0"N
48°0'0"N
CANADA
MONTANA
IDAHO
Kootenai River
95
Bonners Ferry
2
Troy
Pipe Creek
Kootenai River
Libby
Libby Creek
Fisher River
Bull Lake
Lake Pend Orielle
Lake Koocanusa
Sophie Lake
Tobacco River
Grave Creek
93
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40
0 10 20 30
Miles
Critical habitat (stream)
Critical habitat (lake)
River
Water
Road
City

(10) Unit 4: Willamette River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Blue River	44.153 N.	122.342 W.	44.172 N.	122.328 W.
Horse Creek	44.170 N.	122.174 W.	44.125 N.	122.036 W.
Lost Creek	44.190 N.	122.066 W.	44.162 N.	122.022 W.
Mckenzie River	44.126 N.	123.106 W.	44.309 N.	122.028 W.
Middle Fork Willamette River	44.023 N.	123.017 W.	43.481 N.	122.254 W.
South Fork Mckenzie River	44.159 N.	122.295 W.	43.953 N.	122.017 W.
Swift Creek	43.502 N.	122.299 W.	43.560 N.	122.162 W.
West Fork Horse Creek	44.172 N.	122.206 W.	44.170 N.	122.174 W.
Willamette River	44.126 N.	123.106 W.	44.023 N.	123.017 W.

(ii) Map of Unit 4, Willamette River Basin, follows:

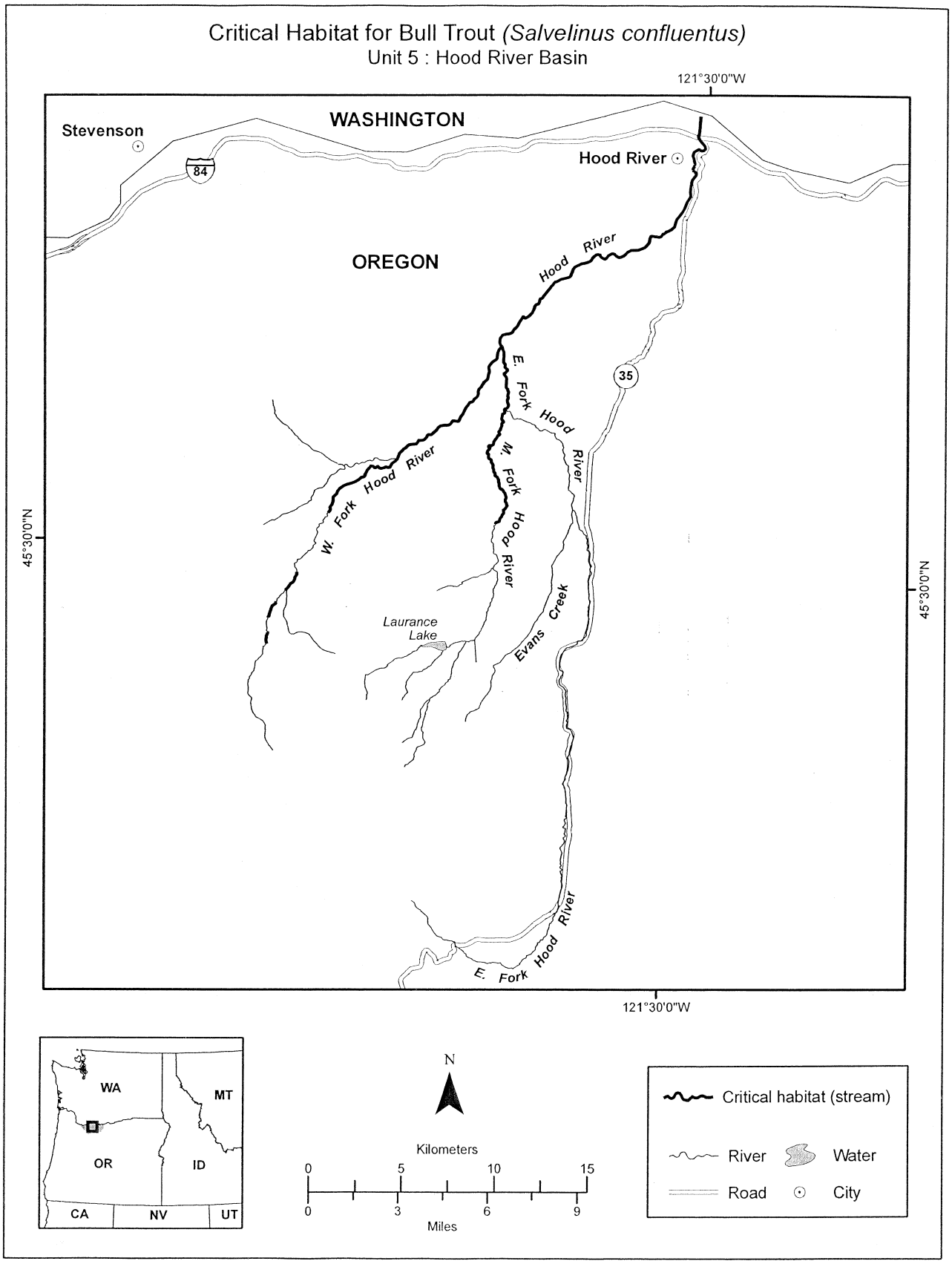

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 4 : Willamette River Basin
123°0'0"W
122°0'0"W
44°0'0"N
Trail Bridge Reservoir
126
5
McKenzie River
Horse Creek
Cougar Reservoir
Eugene
M. Fk. Willamette R.
58
Dexter Res.
OREGON
S. Fk. McKenzie River
Lookout Point Lake
Oakridge
Hills Creek Lake
Swift Creek
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30
0 5 10 15 20
Miles
Critical habitat (stream)
River
Water
Road
City

(11) Unit 5: Hood River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
East Fork Hood River	45.605 N.	121.632 W.	45.575 N.	121.626 W.
Hood River	45.721 N.	121.506 W.	45.605 N.	121.632 W.
Middle Fork Hood River	45.575 N.	121.626 W.	45.463 N.	121.645 W.
West Fork Hood River	45.605 N.	121.632 W.	45.456 N.	121.781 W.

(ii) Map of Unit 5, Hood River Basin, follows:

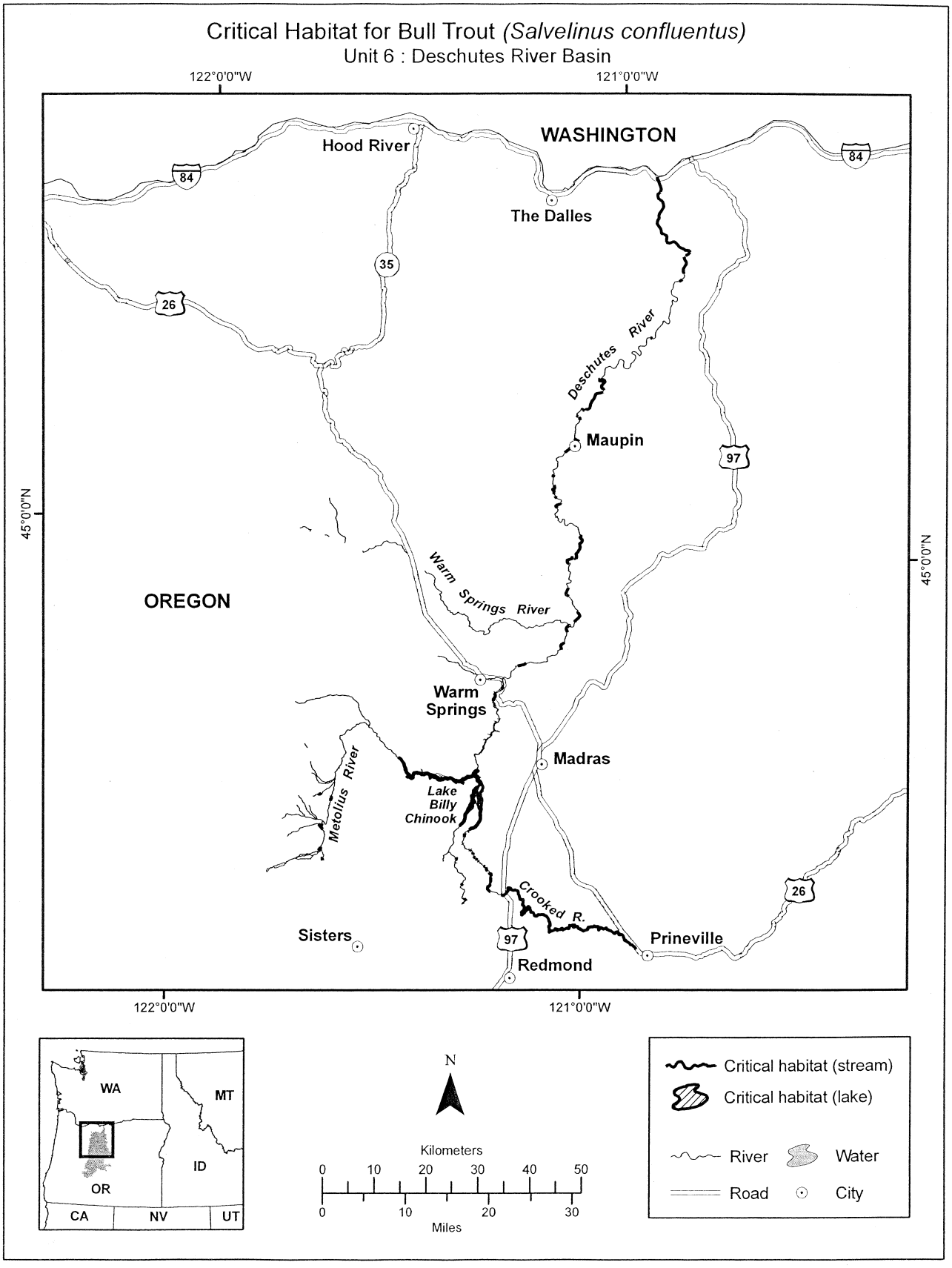

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 5 : Hood River Basin
121°30'0"W
WASHINGTON
Stevenson
84
Hood River
OREGON
Hood River
E. Fork Hood River
35
W. Fork Hood River
W. Fork Hood River
Laurance Lake
Evans Creek
E. Fork Hood River
45°30'0"N
45°30'0"N
121°30'0"W
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 5 10 15
0 3 6 9
Miles
Critical habitat (stream)
River
Water
Road
City

(12) Unit 6: Deschutes River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Abbot Creek	44.570 N.	121.619 W.	44.544 N.	121.670 W.
Deschutes River	45.639 N.	120.914 W.	44.373 N.	121.291 W.
Heising Spring	44.494 N.	121.648 W.	44.491 N.	121.651 W.
Jack Creek	44.493 N.	121.647 W.	44.472 N.	121.725 W.
Lake Billy Chinook	Located at		44.584 N.	121.363 W.
Metolius River	44.577 N.	121.619 W.	44.434 N.	121.637 W.
Spring Creek	44.457 N.	121.642 W.	44.451 N.	121.650 W.

(ii) Map of Unit 6, Deschutes River Basin, follows:

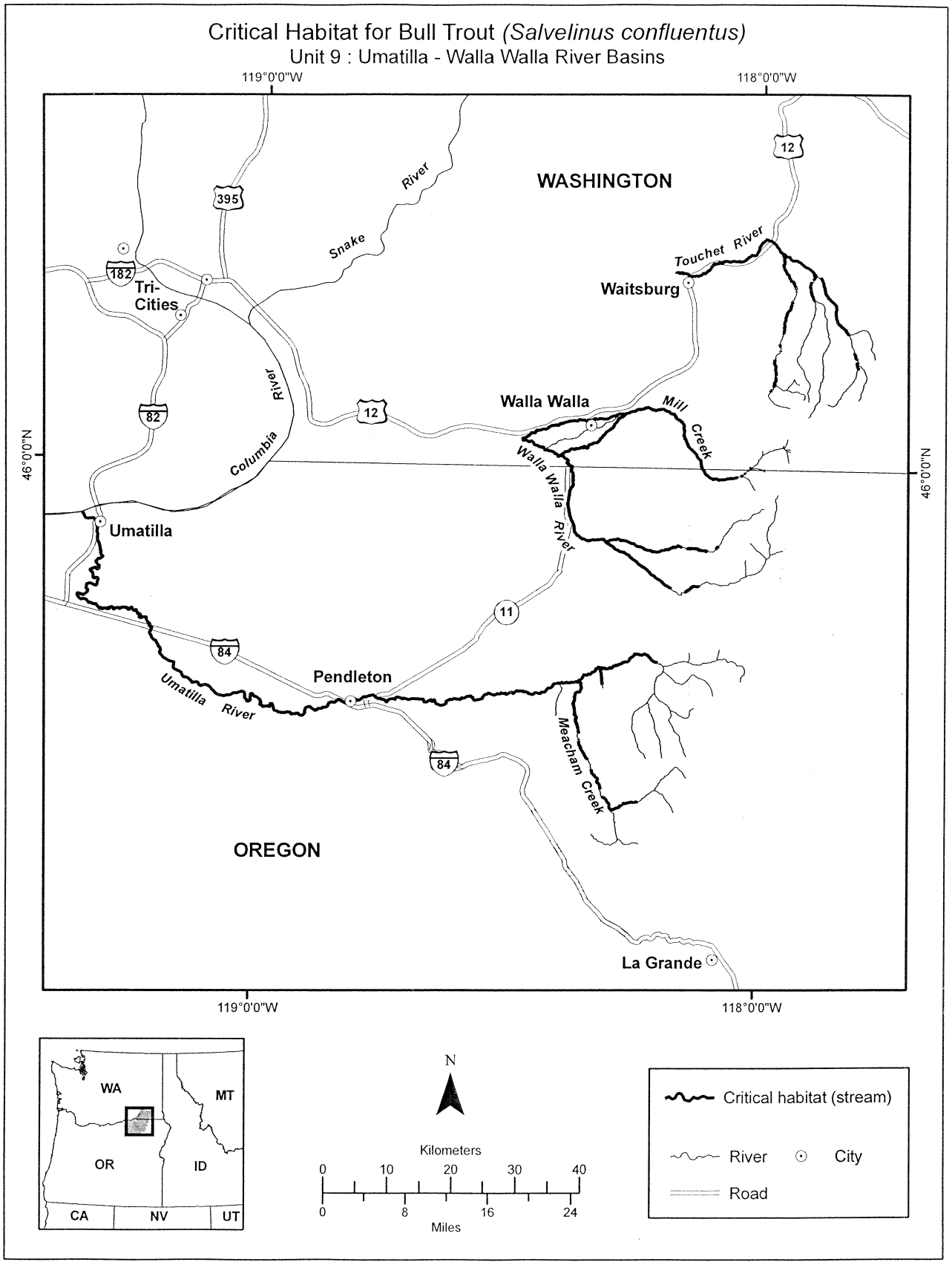

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 6 : Deschutes River Basin
122°0'0"W
121°0'0"W
45°0'0"N
WASHINGTON
OREGON
Hood River
The Dalles
Maupin
Warm Springs
Madras
Sisters
Redmond
Prineville
Deschutes River
Warm Springs River
Metolius River
Lake Billy Chinook
Crooked R.
84
35
26
97
WA
MT
ID
OR
CA
NV
UT
N
Kilometers
0 10 20 30 40 50
0 10 20 30
Miles
Critical habitat (stream)
Critical habitat (lake)
River
Water
Road
City

(13) Unit 9: Umatilla-Walla Walla River Basins.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Griffin Fork	46.121 N.	117.973 W.	46.099 N.	117.913 W.
Lewis Creek	46.191 N.	117.824 W.	46.156 N.	117.771 W.
Low Creek	45.993 N.	118.035 W.	45.973 N.	118.009 W.
Meacham Creek	45.702 N.	118.359 W.	45.527 N.	118.290 W.
Mill Creek	46.039 N.	118.478 W.	46.011 N.	117.941 W.
North Fork Meacham Creek	45.527 N.	118.290 W.	45.575 N.	118.174 W.
North Fork Touchet River	46.302 N.	117.959 W.	46.093 N.	117.864 W.
North Fork Walla Walla River	45.899 N.	118.307 W.	45.947 N.	117.990 W.
Paradise Creek	46.004 N.	118.017 W.	46.001 N.	117.990 W.
Ryan Creek	45.723 N.	118.314 W.	45.694 N.	118.308 W.
South Fork Touchet River	46.302 N.	117.959 W.	46.105 N.	117.985 W.
South Fork Walla Walla River	45.899 N.	118.307 W.	45.966 N.	117.963 W.
Spangler Creek	46.149 N.	117.806 W.	46.099 N.	117.802 W.
Touchet River	46.272 N.	118.174 W.	46.302 N.	117.959 W.
Umatilla River	45.923 N.	119.356 W.	45.726 N.	118.187 W.
Walla Walla River	46.039 N.	118.478 W.	45.899 N.	118.307 W.
Wolf Fork Touchet River	46.274 N.	117.895 W.	46.075 N.	117.903 W.
Yellowhawk Creek	46.017 N.	118.400 W.	46.077 N.	118.272 W.

(ii) Map of Unit 9, Umatilla-Walla Walla River Basins, follows:

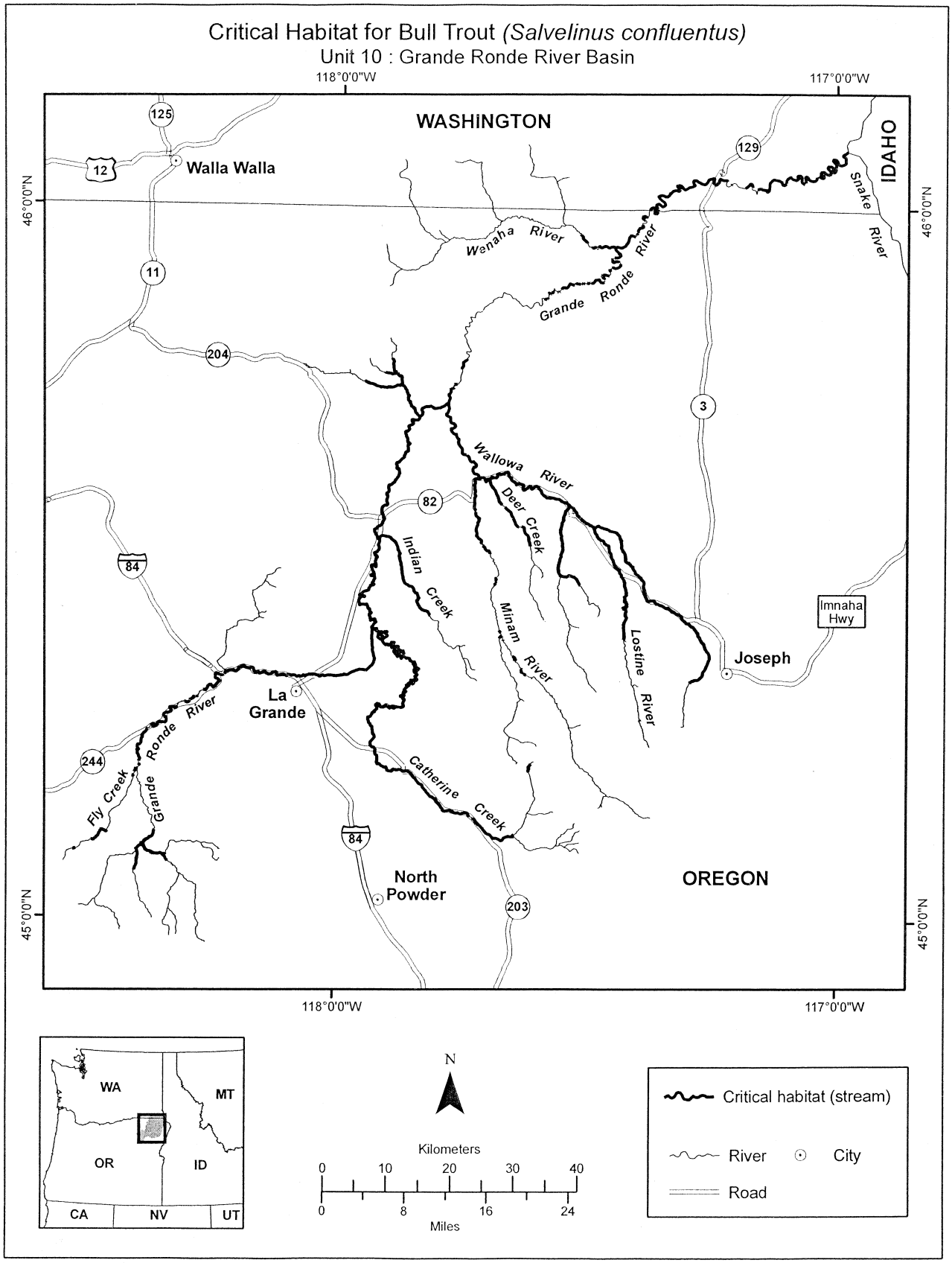

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 9 : Umatilla - Walla Walla River Basins
119°0'0"W
118°0'0"W
46°0'0"N
WASHINGTON
OREGON
Snake River
Columbia River
Touchet River
Waitsburg
Tri-Cities
Walla Walla
Mill Creek
Walla Walla River
Umatilla
Pendleton
Umatilla River
Meacham Creek
La Grande
395
182
82
12
84
11
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40
0 8 16 24
Miles
Critical habitat (stream)
River
City
Road

(14) Unit 10: Grande Ronde River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Bear Creek	45.584 N.	117.540 W.	45.323 N.	117.480 W.
Catherine Creek	45.408 N.	117.930 W.	45.120 N.	117.646 W.
Chicken Creek	45.095 N.	118.394 W.	45.024 N.	118.385 W.
Deer Creek	45.620 N.	117.699 W.	45.423 N.	117.587 W.
Fly Creek	45.210 N.	118.394 W.	45.121 N.	118.465 W.
Grande Ronde River	46.080 N.	116.978 W.	44.967 N.	118.254 W.
Hurricane Creek	45.420 N.	117.301 W.	45.274 N.	117.310 W.
Indian Creek	45.534 N.	117.919 W.	45.337 N.	117.721 W.
Limber Jim Creek	45.089 N.	118.343 W.	45.085 N.	118.229 W.
Little Bear Creek	45.485 N.	117.554 W.	45.428 N.	117.479 W.
Little Fly Creek	45.121 N.	118.465 W.	45.110 N.	118.475 W.
Little Lookingglass Creek	45.750 N.	117.874 W.	45.817 N.	117.901 W.
Little Minam River	45.401 N.	117.671 W.	45.246 N.	117.599 W.
Lookingglass Creek	45.707 N.	117.841 W.	45.779 N.	118.078 W.
Lookout Creek	45.110 N.	118.475 W.	45.078 N.	118.540 W.
Lostine River	45.552 N.	117.489 W.	45.246 N.	117.374 W.
Minam River	45.621 N.	117.720 W.	45.148 N.	117.371 W.
Mottet Creek	45.767 N.	117.886 W.	45.788 N.	117.942 W.
North Fork Catherine Creek	45.120 N.	117.646 W.	45.225 N.	117.604 W.
Sheep Creek	45.105 N.	118.381 W.	45.016 N.	118.507 W.
South Fork Catherine Creek	45.120 N.	117.646 W.	45.112 N.	117.513 W.
Wallowa River	45.726 N.	117.784 W.	45.420 N.	117.301 W.
Wenaha River	45.946 N.	117.450 W.	45.951 N.	117.794 W.

(ii) Map of Unit 10, Grande Ronde River Basin, follows:

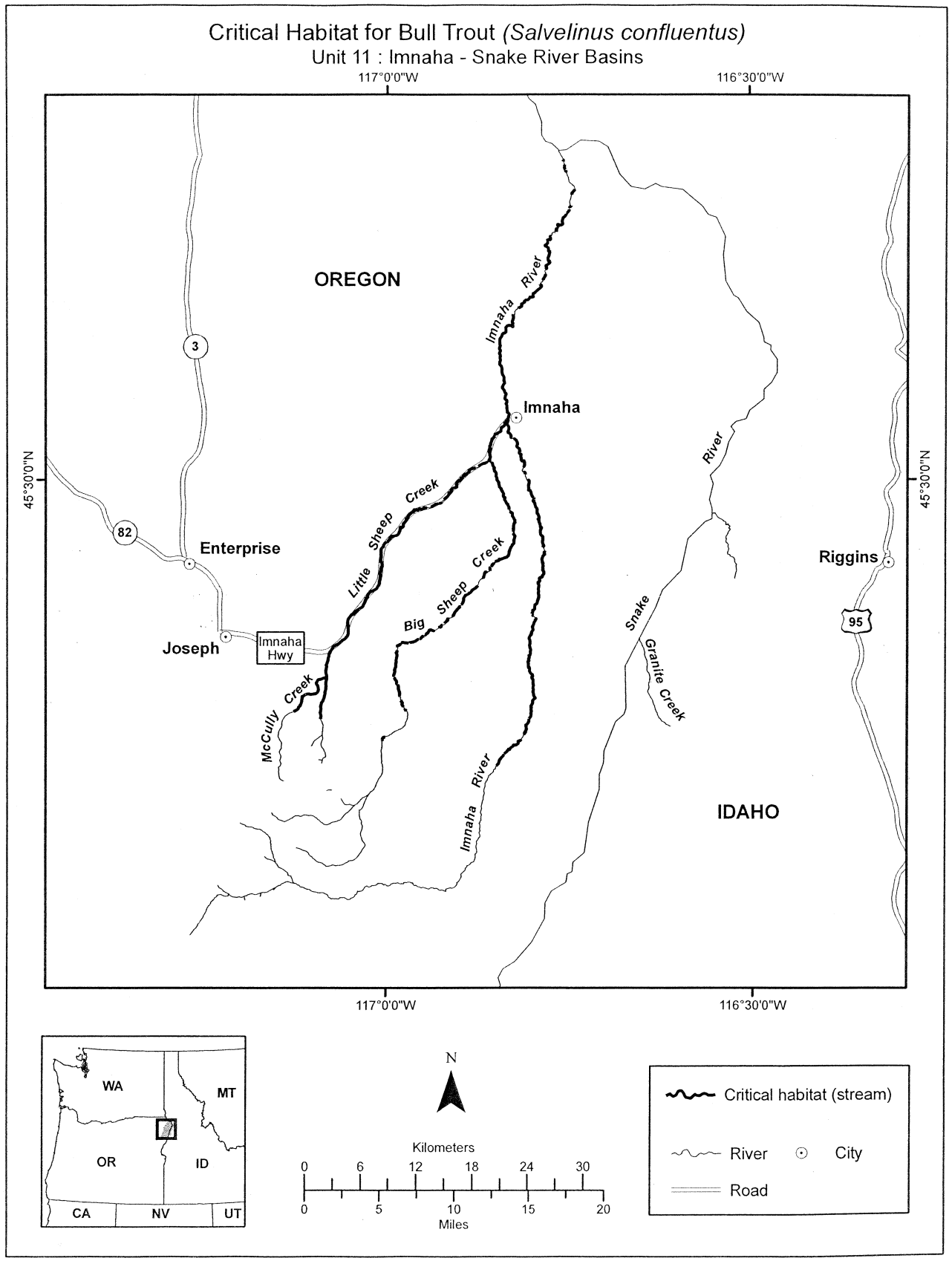

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 10 : Grande Ronde River Basin
118°0'0"W
117°0'0"W
46°0'0"N
45°0'0"N
WASHINGTON
IDAHO
OREGON
Walla Walla
La Grande
Joseph
North Powder
Imnaha Hwy
Wenaha River
Grande Ronde River
Snake River
Wallowa River
Deer Creek
Indian Creek
Minam River
Lostine River
Catherine Creek
Fly Creek
125
12
11
204
129
3
82
84
244
203
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40
0 8 16 24
Miles
Critical habitat (stream)
River
City
Road

(15) Unit 11: Imnaha-Snake River Basins.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Big Sheep Creek	45.557 N.	116.834 W.	45.178 N.	117.119 W.
Imnaha River	45.817 N.	116.764 W.	45.113 N.	117.125 W.
Little Sheep Creek	45.520 N.	116.859 W.	45.232 N.	117.093 W.
McCully Creek	45.311 N.	117.082 W.	45.211 N.	117.140 W.

(ii) Map of Unit 11, Imnaha-Snake River Basins, follows:

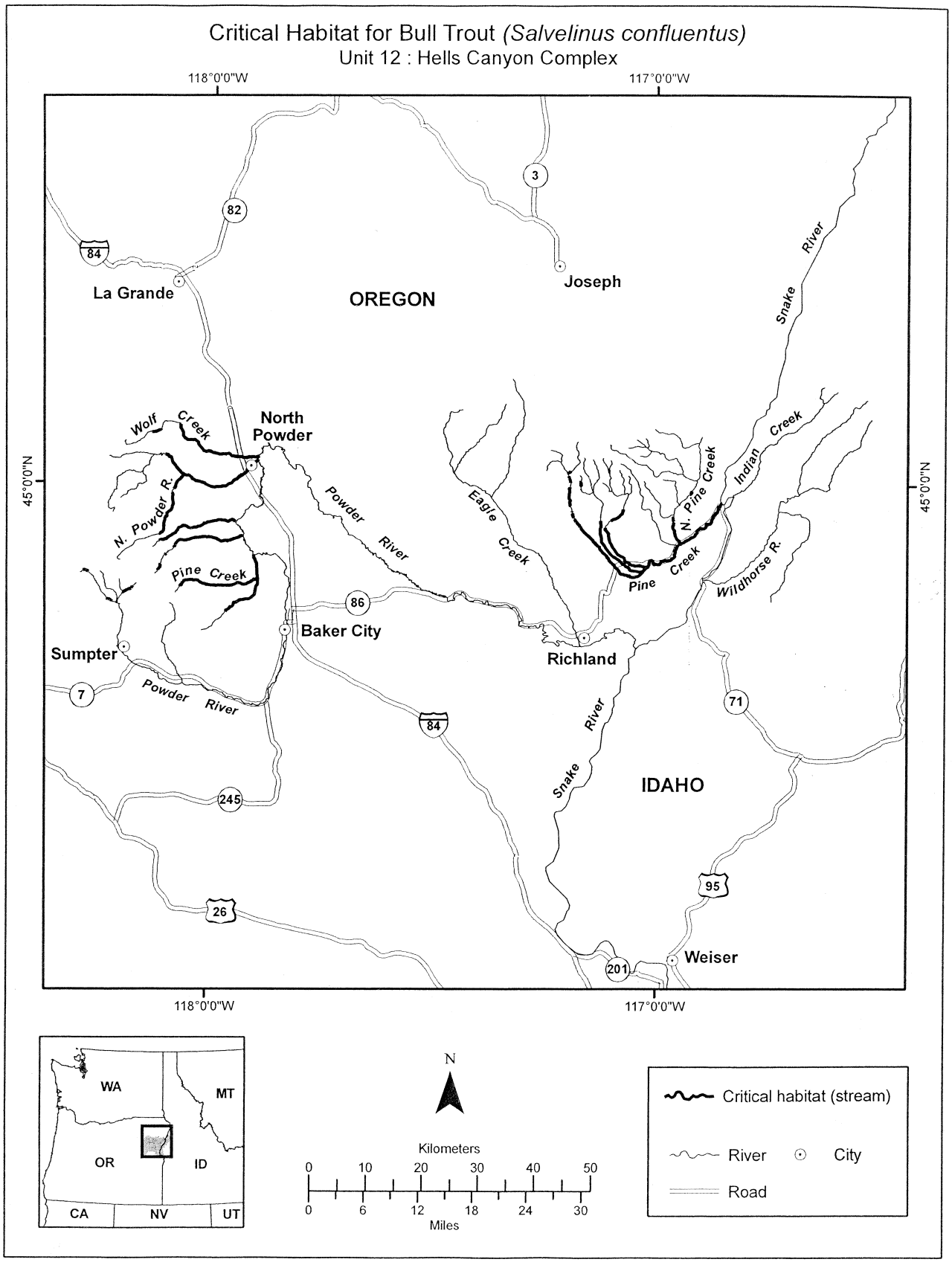

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 11 : Imnaha - Snake River Basins
117°0'0"W
116°30'0"W
45°30'0"N
OREGON
IDAHO
Imnaha River
Imnaha
Enterprise
Joseph
Imnaha Hwy
Little Sheep Creek
Big Sheep Creek
McCully Creek
Snake River
Granite Creek
Riggins
3
82
95
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 6 12 18 24 30
0 5 10 15 20
Miles
Critical habitat (stream)
River
City
Road

(16) Unit 12: Hells Canyon Complex.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Anthony Creek	45.013 N.	118.059 W.	44.953 N.	118.220 W.
Big Muddy Creek	44.940 N.	117.945 W.	44.899 N.	118.131 W.
Clear Creek	44.866 N.	117.029 W.	45.043 N.	117.143 W.
East Fork Pine Creek	45.022 N.	117.200 W.	45.072 N.	117.176 W.
East Pine Creek	44.872 N.	117.020 W.	45.046 N.	117.119 W.
Little Cracker Creek	44.826 N.	118.196 W.	44.840 N.	118.166 W.
Meadow Creek	44.990 N.	117.142 W.	45.017 N.	117.171 W.
North Pine Creek	44.910 N.	116.948 W.	45.079 N.	116.897 W.
North Powder River	45.039 N.	117.895 W.	44.878 N.	118.203 W.
Pine Creek	44.849 N.	117.893 W.	44.826 N.	118.078 W.
Pine Creek	44.974 N.	116.853 W.	45.039 N.	117.215 W.
Rock Creek	44.918 N.	117.929 W.	44.856 N.	118.124 W.
Salmon Creek	44.888 N.	117.902 W.	44.767 N.	118.019 W.
Silver Creek	44.809 N.	118.207 W.	44.857 N.	118.291 W.
Wolf Creek	45.044 N.	117.893 W.	45.068 N.	118.193 W.

(ii) Map of Unit 12, Hells Canyon Complex, follows:

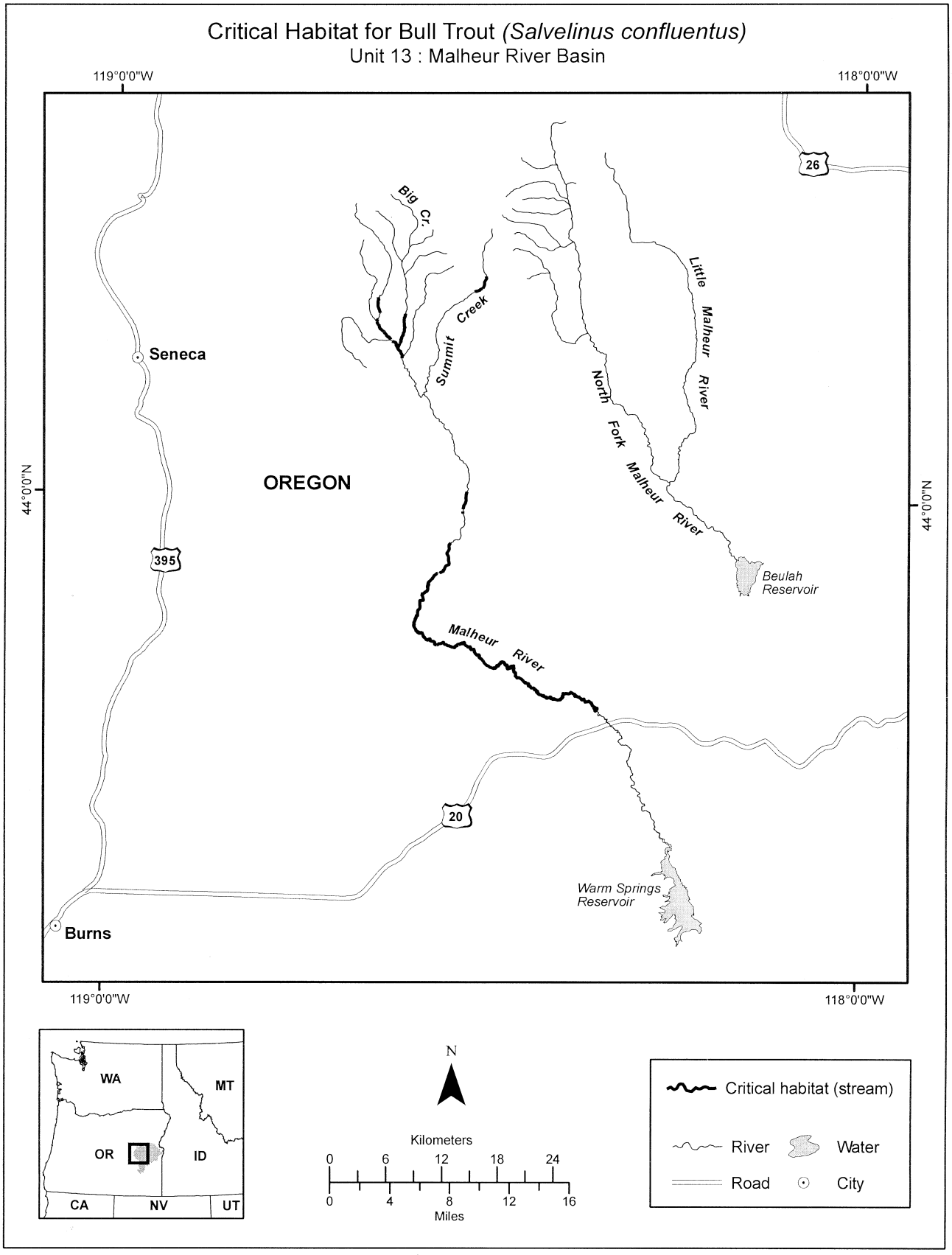

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 12 : Hells Canyon Complex
118°0'0"W
117°0'0"W
45°0'0"N
OREGON
IDAHO
La Grande
Joseph
North Powder
Baker City
Sumpter
Richland
Weiser
Wolf Creek
N. Powder R.
Pine Creek
Powder River
Eagle Creek
N. Pine Creek
Indian Creek
Snake River
Wildhorse R.
Pine Creek
Powder River
Snake River
82
84
3
86
7
84
71
245
26
95
201
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40 50
0 6 12 18 24 30
Miles
Critical habitat (stream)
River
City
Road

(17) Unit 13: Malheur River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Big Creek	44.145 N.	118.624 W.	44.292 N.	118.638 W.
Lake Creek	44.145 N.	118.624 W.	44.283 N.	118.683 W.
Malheur River	43.686 N.	118.270 W.	44.145 N.	118.624 W.
Summit Creek	44.099 N.	118.587 W.	44.261 N.	118.501 W.

(ii) Map of Unit 13, Malheur River Basin, follows:

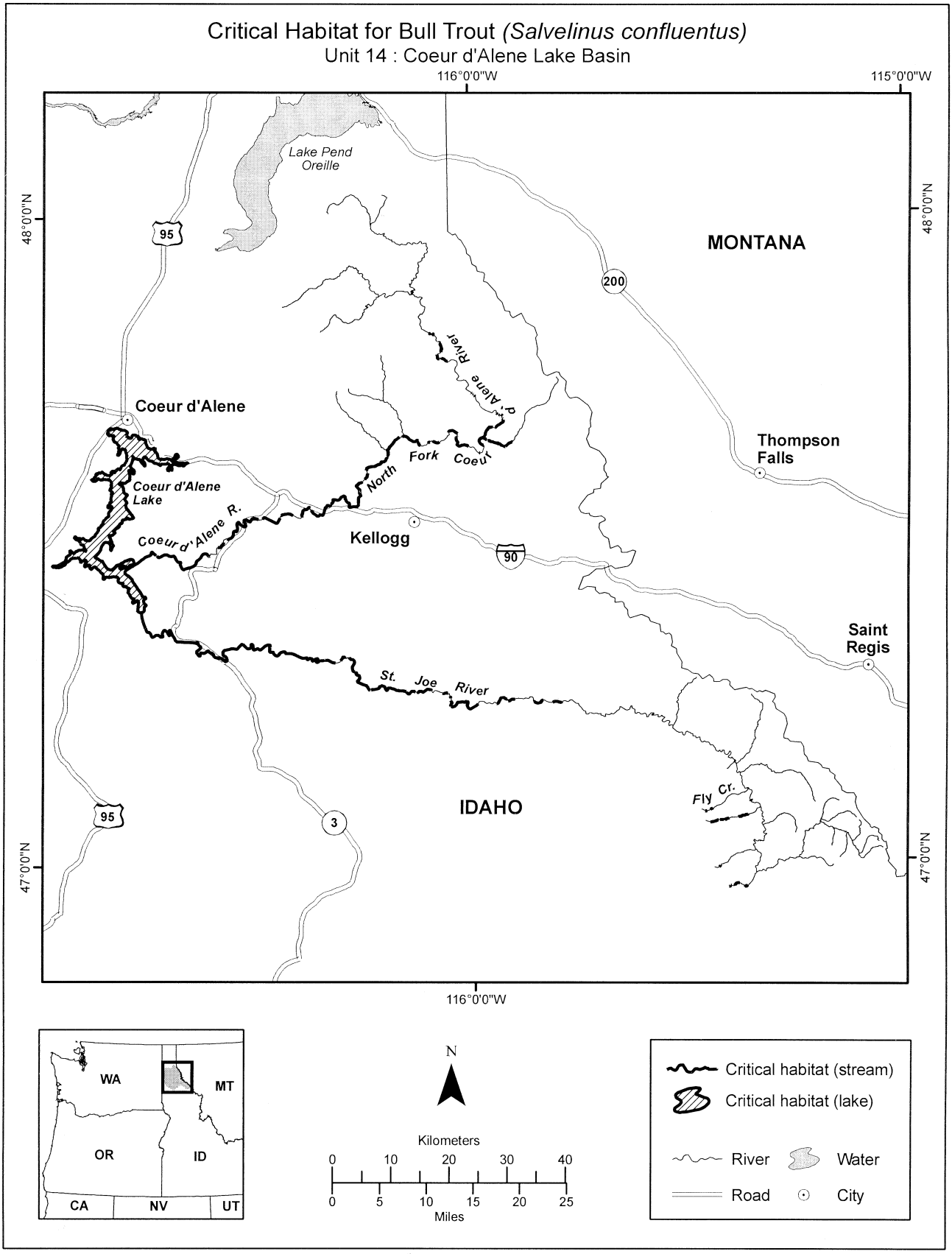

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 13 : Malheur River Basin
119°0'0"W
118°0'0"W
44°0'0"N
Seneca
OREGON
Big Cr.
Summit Creek
North Fork Malheur River
Little Malheur River
Beulah Reservoir
Malheur River
Warm Springs Reservoir
Burns
26
395
20
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 6 12 18 24
0 4 8 12 16
Miles
Critical habitat (stream)
River
Water
Road
City

(18) Unit 14: Coeur d'Alene Lake Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Beaver Creek	47.083 N.	115.355 W.	47.064 N.	115.480 W.
Coeur d'Alene Lake	Located at		47.449 N.	116.798 W.
Coeur d'Alene River	47.460 N.	116.798 W.	47.558 N.	116.257 W.
Eagle Creek	47.644 N.	115.921 W.	47.652 N.	115.903 W.
Fly Creek	47.113 N.	115.385 W.	47.081 N.	115.489 W.
North Fork Coeur d'Alene River	47.558 N.	116.257 W.	48.006 N.	116.321 W.
Prichard Creek	47.658 N.	115.976 W.	47.644 N.	115.921 W.
Ruby Creek	46.983 N.	115.367 W.	46.961 N.	115.430 W.
St. Joe River	47.393 N.	116.749 W.	47.017 N.	115.078 W.
Steamboat Creek	47.662 N.	116.154 W.	47.716 N.	116.199 W.
Timber Creek	47.018 N.	115.368 W.	46.992 N.	115.462 W.

(ii) Map of Unit 14, Coeur d'Alene Lake Basin, follows:

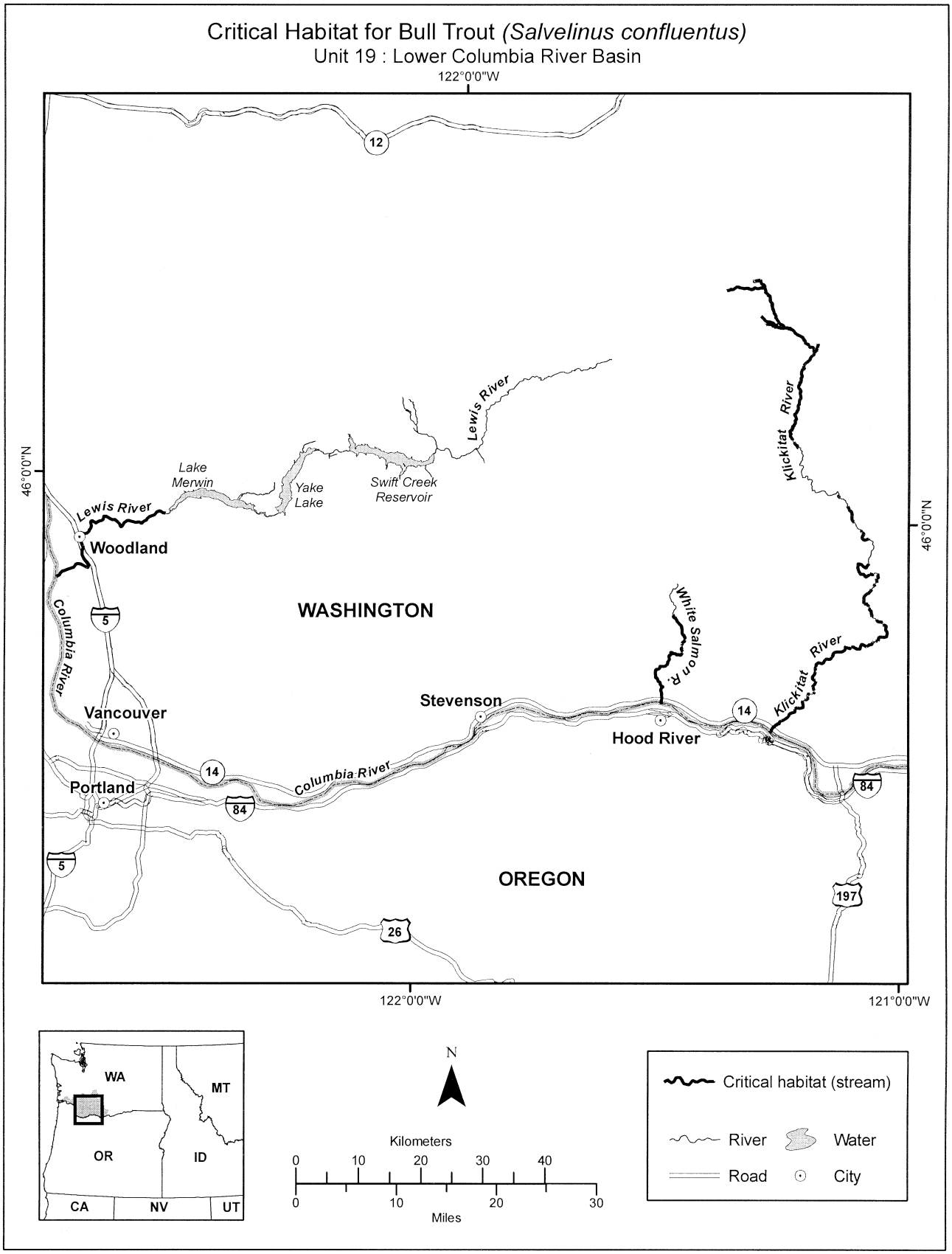

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 14 : Coeur d'Alene Lake Basin
116°0'0"W
115°0'0"W
48°0'0"N
47°0'0"N
Lake Pend Oreille
MONTANA
IDAHO
Coeur d'Alene
Coeur d'Alene Lake
Coeur d'Alene R.
North Fork Coeur d'Alene River
Kellogg
Thompson Falls
Saint Regis
St. Joe River
Fly Cr.
95
200
90
3
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40
0 5 10 15 20 25
Miles
Critical habitat (stream)
Critical habitat (lake)
River
Water
Road
City

(19) Unit 19: Lower Columbia River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Clearwater Creek	46.276 N.	121.327 W.	46.278 N.	121.330 W.
Fish Lake Stream	46.275 N.	121.312 W.	46.342 N.	121.368 W.
Klickitat River	45.691 N.	121.293 W.	46.255 N.	121.239 W.
Lewis River (Lower)	45.850 N.	122.782 W.	45.957 N.	122.555 W.
Little Muddy Creek	46.275 N.	121.312 W.	46.278 N.	121.352 W.
Trappers Creek	46.275 N.	121.330 W.	46.290 N.	121.362 W.
Two Lakes Stream	46.342 N.	121.368 W.	46.340 N.	121.384 W.
UNNAMED—off Fish Lake Stream	46.331 N.	121.359 W.	46.323 N.	121.437 W.
West Fork Klickitat River	46.242 N.	121.246 W.	46.275 N.	121.312 W.
White Salmon River	45.723 N.	121.521 W.	45.897 N.	121.503 W.

(ii) Map of Unit 19, Lower Columbia River Basin, follows:

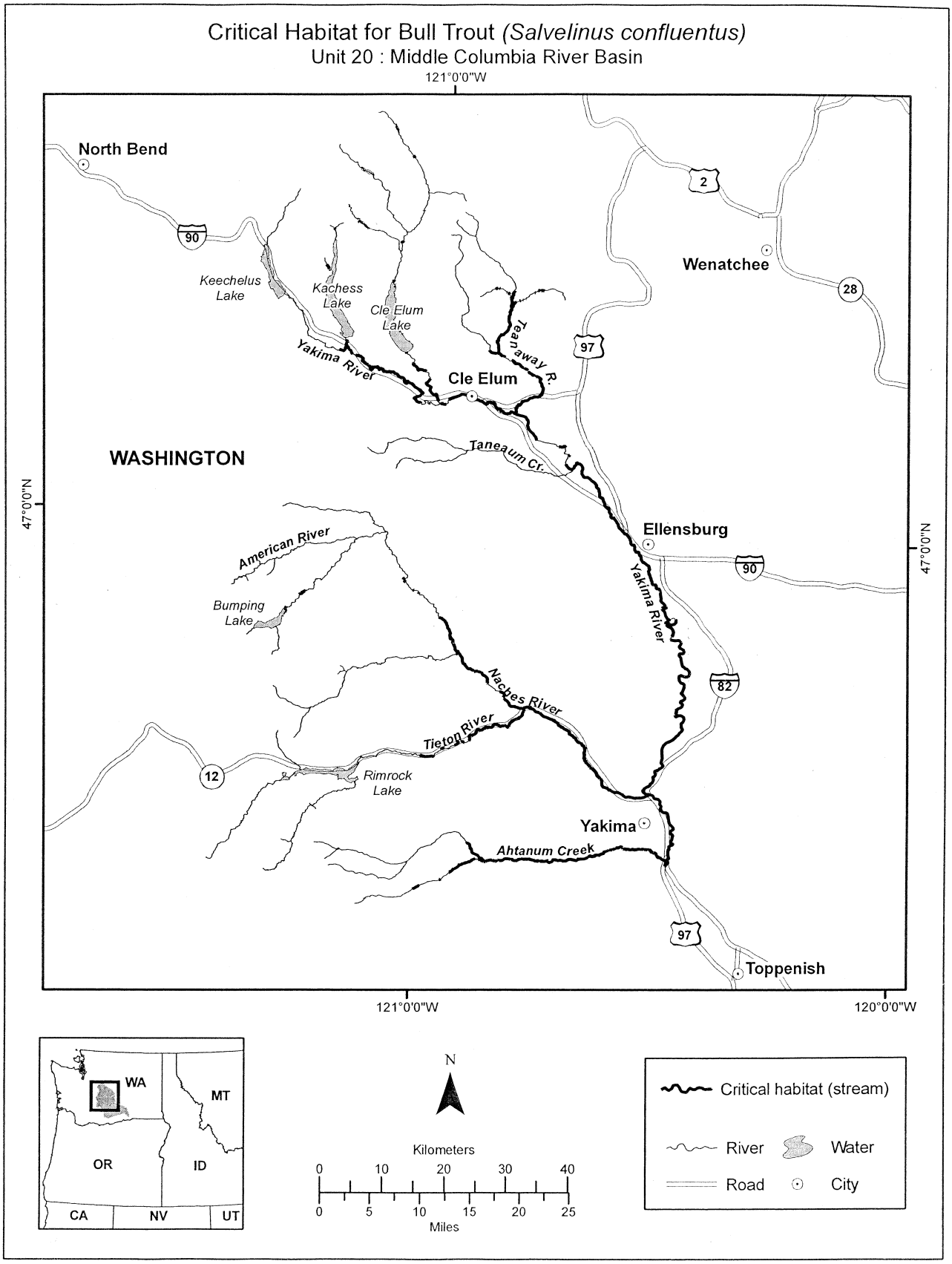

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 19 : Lower Columbia River Basin
122°0'0"W
46°0'0"N
12
Lewis River
Lake Merwin
Yake Lake
Swift Creek Reservoir
Klickitat River
Woodland
WASHINGTON
Columbia River
5
White Salmon R.
Stevenson
Vancouver
Hood River
14
Portland
Columbia River
84
OREGON
197
26
121°0'0"W
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40
0 10 20 30
Miles
Critical habitat (stream)
River
Water
Road
City

(20) Unit 20: Middle Columbia River Basin.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Ahtanum Creek	46.529 N.	120.472 W.	46.523 N.	120.853 W.
Box Canyon Creek	47.361 N.	121.243 W.	47.377 N.	121.257 W.
Bumping River	46.989 N.	121.094 W.	46.831 N.	121.377 W.
Cle Elum River	47.177 N.	120.990 W.	47.589 N.	121.161 W.
Cooper River	47.391 N.	121.098 W.	47.455 N.	121.213 W.
Gold Creek	47.390 N.	121.382 W.	47.475 N.	121.316 W.
Jack Creek	47.319 N.	120.855 W.	47.334 N.	120.742 W.
Jungle Creek	47.333 N.	120.855 W.	47.333 N.	120.923 W.
Kachess River	47.251 N.	121.200 W.	47.429 N.	121.222 W.
Naches River	46.630 N.	120.514 W.	46.989 N.	121.094 W.
North Fork Ahtanum Creek	46.523 N.	120.853 W.	46.538 N.	121.211 W.
North Fork Teanaway River	47.251 N.	120.877 W.	47.454 N.	120.965 W.
North Fork Tieton River	46.635 N.	121.261 W.	46.508 N.	121.435 W.
Rattlesnake Creek	46.820 N.	120.929 W.	46.760 N.	121.315 W.
South Fork Ahtanum Creek	46.523 N.	120.853 W.	46.454 N.	121.118 W.
Teanaway River	47.167 N.	120.834 W.	47.257 N.	120.897 W.
Tieton River	46.746 N.	120.786 W.	46.656 N.	121.129 W.
Yakima River	46.529 N.	120.472 W.	47.322 N.	121.339 W.

(ii) Map of Unit 20, Middle Columbia River Basin, follows:

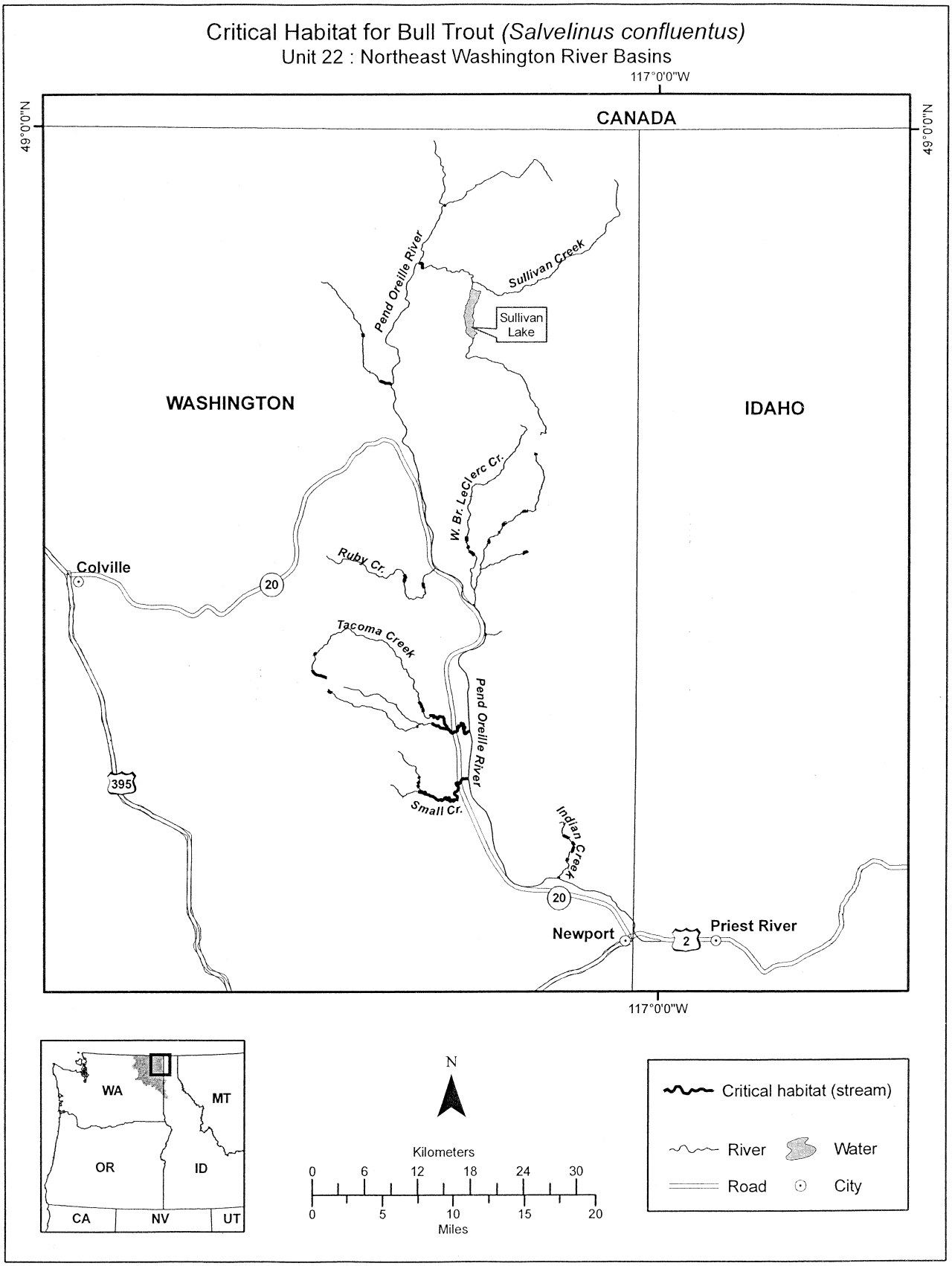

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 20 : Middle Columbia River Basin
121°0'0"W
North Bend
90
Keechelus Lake
Kachess Lake
Cle Elum Lake
Yakima River
Teanaway R.
Cle Elum
97
2
Wenatchee
28
WASHINGTON
Taneaum Cr.
47°0'0"N
American River
Bumping Lake
Ellensburg
90
Yakima River
82
Naches River
Tieton River
12
Rimrock Lake
Yakima
Ahtanum Creek
97
Toppenish
121°0'0"W
120°0'0"W
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 10 20 30 40
0 5 10 15 20 25
Miles
Critical habitat (stream)
River
Water
Road
City

(21) Unit 22: Northeast Washington River Basins.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint Latitude	Stream endpoint latitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Calispell	48.344 N	117.289 W	48.321 N	117.307 W.
Cedar Creek	48.742 N.	117.411 W	48.846 N	117.521 W.
E. Fork Small Creek	48.328 N	117.354 W	48.371 N	117.398 W.
East Branch LeClerc Creek	48.534 N	117.282 W	48.673 N	117.188 W.
Fourth of July Creek	48.556 N	117.272 W	48.573 N	117.200 W.
Indian Creek	48.243 N	117.151 W	48.299 N	117.151 W.
LeClerc Creek	48.518 N	117.283 W	48.534 N	117.282 W.
Mill Creek	48.489 N	117.265 W	48.493 N	117.239 W.
Ruby Creek	48.556 N	117.342 W	48.568 N	117.509 W.
S. Fork Tacoma Creek	48.394 N	117.323 W	48.432 N	117.506 W.
Slate Creek	48.923 N	117.332 W	48.948 N	117.165 W.
Small Creek	48.321 N	117.307 W	48.337 N	117.409 W.
Sullivan Creek	48.865 N	117.370 W	48.950 N	117.070 W.
Tacoma Creek	48.392 N	117.288 W	48.445 N	117.507 W.
West Branch LeClerc Creek	48.534 N	117.282 W	48.701 N	117.211 W.

(ii) Map of Unit 22, Northeast Washington River Basins, follows:

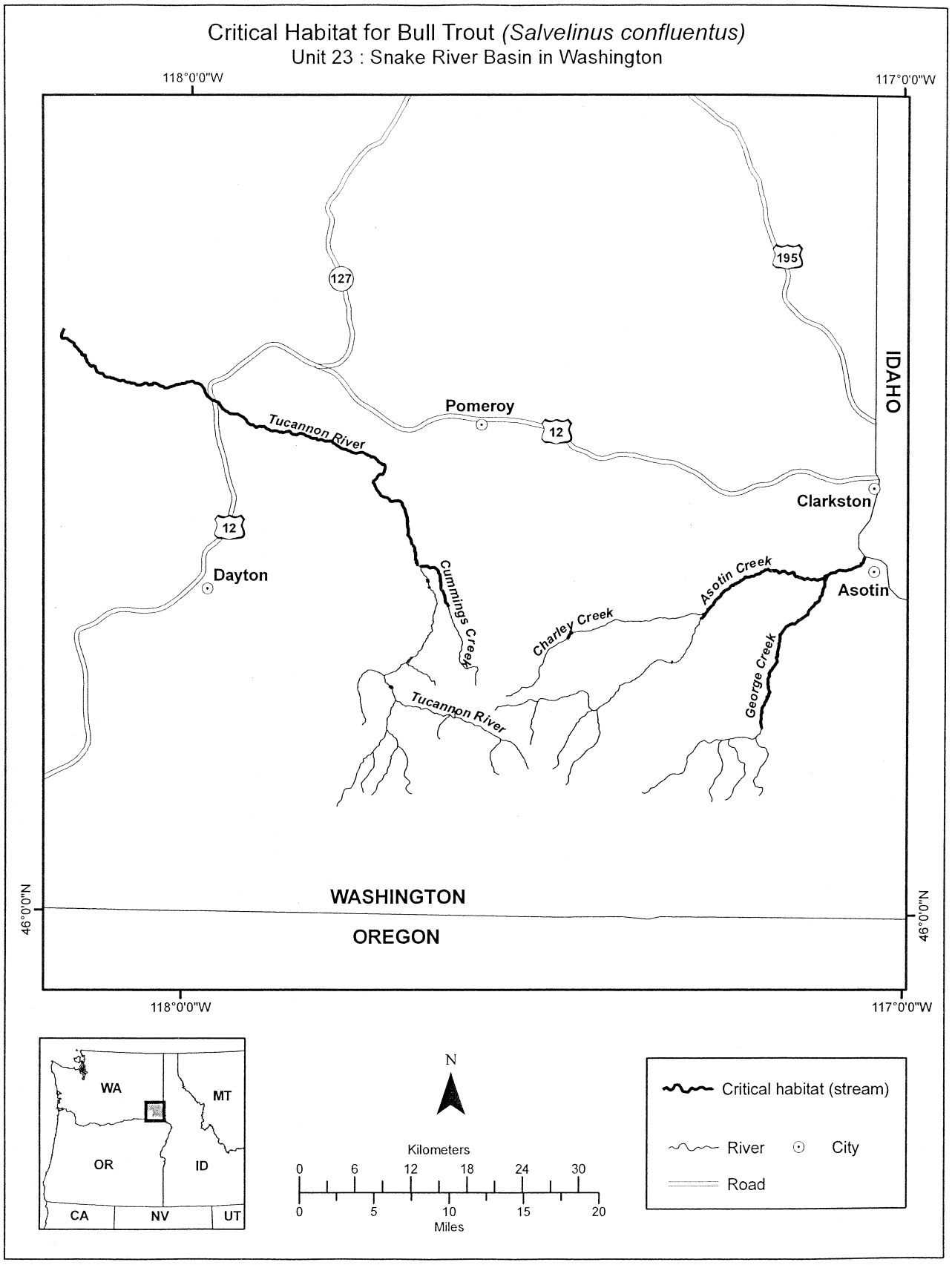

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 22 : Northeast Washington River Basins
117°0'0"W
49°0'0"N
CANADA
WASHINGTON
IDAHO
Pend Oreille River
Sullivan Creek
Sullivan Lake
W. Br. LeClerc Cr.
Ruby Cr.
Colville
20
Tacoma Creek
Pend Oreille River
395
Small Cr.
Indian Creek
20
Newport
2
Priest River
117°0'0"W
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 6 12 18 24 30
0 5 10 15 20
Miles
Critical habitat (stream)
River
Water
Road
City

(22) Unit 23: Snake River Basin in Washington.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Asotin Creek	46.345 N	117.053 W	46.272 N	117.291 W.
Charley Creek	46.289 N	117.278 W	46.210 N	117.552 W.
Cummings Creek	46.333 N	117.674 W	46.219 N	117.595 W.
George Creek	46.326 N	117.105 W	46.118 N	117.363 W.
Hixon Creek	46.246 N	117.683 W	46.219 N	117.651 W.
N. Fork Asotin Creek	46.272 N	117.291 W	46.196 N	117.568 W.
Tucannon River	46.558 N	118.174 W	46.139 N	117.520 W

(ii) Map of Unit 23, Snake River Basin in Washington, follows:

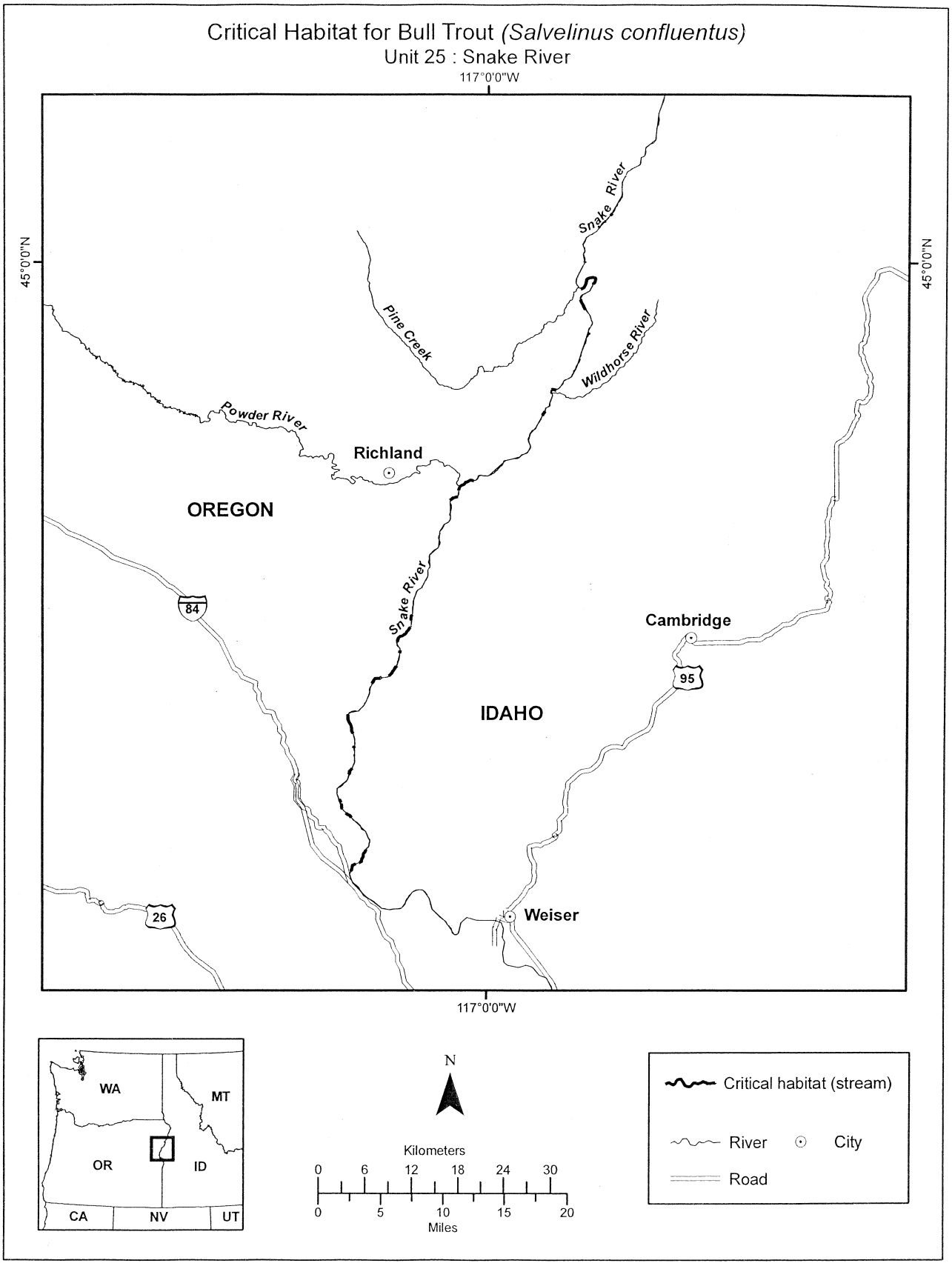

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 23 : Snake River Basin in Washington
118°0'0"W
117°0'0"W
46°0'0"N
127
195
12
IDAHO
Pomeroy
Tucannon River
Clarkston
Dayton
Cummings Creek
Asotin Creek
Asotin
Charley Creek
George Creek
Tucannon River
WASHINGTON
OREGON
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 6 12 18 24 30
0 5 10 15 20
Miles
Critical habitat (stream)
River
City
Road

(23) Unit 25: Snake River.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Snake River	46.189 N	119.030 W	44.243 N	117.041 W.

(ii) Map of Unit 25, Snake River, follows:



BILLING CODE 4310–55–C

(24) Unit 27: Olympic Peninsula.

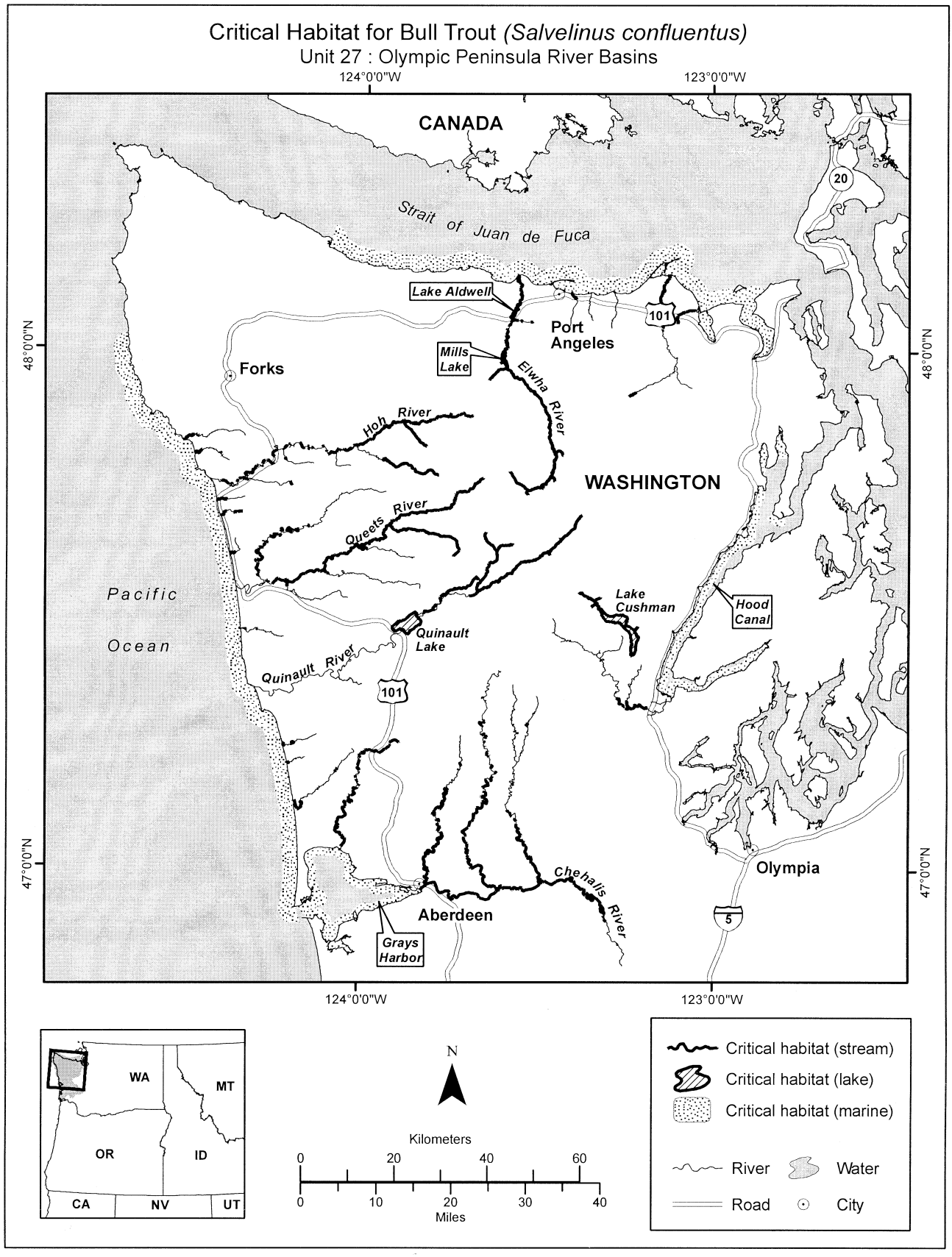
(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Bell Creek	48.083 N.	123.052 W.	48.057 N.	123.102 W.
Big Creek	47.518 N.	123.773 W.	47.566 N.	123.680 W.
Boulder Creek	47.982 N.	123.602 W.	47.979 N.	123.612 W.
Buckinghorse Creek	47.747 N.	123.481 W.	47.739 N.	123.484 W.
Canyon River	47.211 N.	123.551 W.	47.338 N.	123.498 W.
Cat Creek	47.971 N.	123.593 W.	47.946 N.	123.642 W.
Cedar Creek	47.712 N.	124.415 W.	47.717 N.	124.335 W.
Chehalis River	46.962 N.	123.823 W.	46.819 N.	123.252 W.
Clearwater River	47.546 N.	124.291 W.	47.730 N.	123.934 W.
Copalis River	47.133 N.	124.180 W.	47.234 N.	124.020 W.
Cougar Creek	47.862 N.	123.859 W.	47.868 N.	123.853 W.
Delabarre Creek	47.735 N.	123.526 W.	47.726 N.	123.527 W.
Dungeness River	48.151 N.	123.133 W.	47.942 N.	123.091 W.
Elk Creek	47.515 N.	123.330 W.	47.510 N.	123.344 W.
Elwha River	48.151 N.	123.558 W.	47.771 N.	123.580 W.
Ennis Creek	48.117 N.	123.404 W.	48.053 N.	123.410 W.
Godkin Creek	47.760 N.	123.464 W.	47.752 N.	123.451 W.
Goodman Creek	47.825 N.	124.512 W.	47.835 N.	124.338 W.
Gray Wolf River	47.977 N.	123.111 W.	47.916 N.	123.242 W.
Grays Harbor Marine	46.927 N.	124.179 W.	46.906 N.	124.138 W.
Griff Creek	48.013 N.	123.591 W.	48.023 N.	123.593 W.
Hayes River	47.808 N.	123.453 W.	47.803 N.	123.428 W.
Hoh Creek	47.877 N.	123.753 W.	47.883 N.	123.750 W.
Hoh River	47.751 N.	124.437 W.	47.878 N.	123.688 W.
Hood Canal Marine	47.685 N.	122.800 W.	47.434 N.	122.841 W.
Hughes Creek	48.025 N.	123.594 W.	48.026 N.	123.598 W.
Humptulips River	47.045 N.	124.048 W.	47.247 N.	123.888 W.
Hurd Creek	48.124 N.	123.142 W.	48.118 N.	123.142 W.
Ignar Creek	47.639 N.	123.432 W.	47.637 N.	123.429 W.
Irely Creek	47.565 N.	123.678 W.	47.567 N.	123.672 W.
Irely Lake	Located at		47.565 N.	123.672 W.
Joe Creek	47.206 N.	124.202 W.	47.217 N.	124.153 W.
Kalaloch Creek	47.607 N.	124.374 W.	47.637 N.	124.360 W.
Little River	48.063 N.	123.576 W.	48.033 N.	123.456 W.
Matheny Creek	47.576 N.	124.113 W.	47.543 N.	123.835 W.
Moclips River	47.248 N.	124.219 W.	47.260 N.	124.122 W.
Morse Creek	48.118 N.	123.350 W.	48.064 N.	123.346 W.
Mosquito Creek	47.799 N.	124.481 W.	47.787 N.	124.382 W.
Mount Tom Creek	47.868 N.	123.887 W.	47.819 N.	123.820 W.
Nolan Creek	47.752 N.	124.343 W.	47.743 N.	124.201 W.
North Fork Quinault River	47.540 N.	123.666 W.	47.654 N.	123.646 W.
North Fork Skokomish River (Lower)	47.315 N.	123.238 W.	47.398 N.	123.200 W.
North Fork Skokomish River (Upper)	47.419 N.	123.224 W.	47.539 N.	123.380 W.
OGS Creek	47.878 N.	123.770 W.	47.879 N.	123.767 W.
O'Neil Creek	47.616 N.	123.470 W.	47.610 N.	123.463 W.
Owl Creek	47.805 N.	124.078 W.	47.780 N.	124.037 W.
Pacific Coast Marine	48.003 N.	124.678 W.	46.927 N.	124.179 W.
Prescott Creek	47.903 N.	123.490 W.	47.904 N.	123.486 W.
Pyrites Creek	47.639 N.	123.432 W.	47.644 N.	123.435 W.
Queets River	47.544 N.	124.354 W.	47.758 N.	123.657 W.
Quinault Lake	Located at		47.471 N.	123.871 W.
Quinault River	47.349 N.	124.299 W.	47.687 N.	123.371 W.
Richert Spring	47.320 N.	123.218 W.	47.320 N.	123.224 W.
Rustler Creek	47.617 N.	123.615 W.	47.629 N.	123.568 W.
Salmon River	47.557 N.	124.219 W.	47.524 N.	124.040 W.
Sams River	47.625 N.	124.012 W.	47.604 N.	123.851 W.
Satsop River	46.979 N.	123.480 W.	47.035 N.	123.524 W.
Skokomish River	47.335 N.	123.116 W.	47.315 N.	123.238 W.
Slate Creek	47.521 N.	123.335 W.	47.529 N.	123.319 W.
Slough off of Elwha	48.145 N.	123.567 W.	48.138 N.	123.558 W.
South Fork Hoh River	47.820 N.	124.022 W.	47.764 N.	123.785 W.
South Fork Skokomish River	47.315 N.	123.238 W.	47.488 N.	123.454 W.
Steamboat Creek	47.679 N.	124.403 W.	47.688 N.	124.349 W.
Strait of Juan de Fuca Marine	48.103 N.	122.884 W.	48.217 N.	124.100 W.
Tshletshy Creek	47.666 N.	123.923 W.	47.606 N.	123.739 W.
West Fork Satsop River	47.035 N.	123.524 W.	47.360 N.	123.565 W.
Winfield Creek	47.810 N.	124.231 W.	47.783 N.	124.142 W.

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Wishkah River	46.973 N.	123.806 W.	47.261 N.	123.713 W.
Wynoochee River	46.962 N.	123.606 W.	47.385 N.	123.604 W.

(ii) Map of Unit 27, Olympic Peninsula, follows:

BILLING CODE 4310–55–P



BILLING CODE 4310–55–C

(25) Unit 28: Puget Sound.

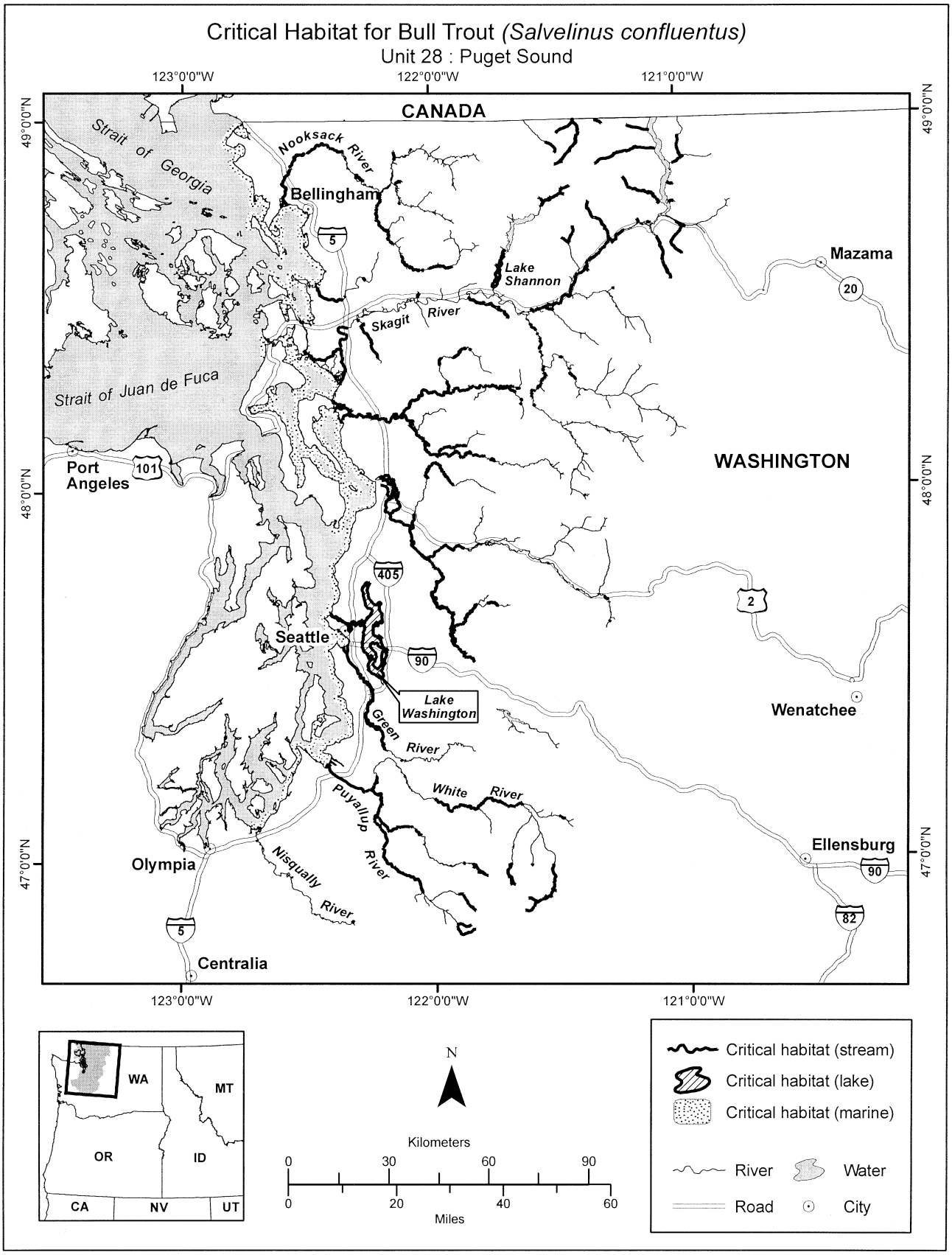
(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Alma Creek	48.600 N.	121.361 W.	48.590 N.	121.355 W.
Bacon Creek	48.586 N.	121.394 W.	48.681 N.	121.462 W.
Baker River	48.534 N.	121.735 W.	48.821 N.	121.427 W.
Bald Eagle Creek	48.800 N.	121.464 W.	48.797 N.	121.448 W.
Bear Creek	48.965 N.	121.387 W.	48.966 N.	121.382 W.
Bear Lake Outlet (stream catalog #0317)	48.607 N.	121.911 W.	48.610 N.	121.911 W.
Big Beaver Creek	48.773 N.	121.045 W.	48.842 N.	121.210 W.
Boulder River	48.282 N.	121.786 W.	48.245 N.	121.827 W.
Brush Creek	48.913 N.	121.423 W.	48.909 N.	121.422 W.
Canyon Creek	48.098 N.	121.969 W.	48.158 N.	121.816 W.
Canyon Creek (Canyon Lake Creek)	48.832 N.	122.143 W.	48.840 N.	122.110 W.
Carbon River	47.130 N.	122.232 W.	46.964 N.	121.794 W.
Cascade River	48.524 N.	121.429 W.	48.463 N.	121.163 W.
Chenuis Creek	46.992 N.	121.842 W.	46.993 N.	121.841 W.
Chilliwack River	49.000 N.	121.410 W.	48.878 N.	121.486 W.
Clearwater River	47.146 N.	121.833 W.	47.079 N.	121.781 W.
Corkindale Creek	48.505 N.	121.485 W.	48.518 N.	121.482 W.
Crystal Creek	46.929 N.	121.537 W.	46.920 N.	121.525 W.
Crystal Creek	48.787 N.	121.501 W.	48.791 N.	121.509 W.
Dan Creek	48.298 N.	121.550 W.	48.265 N.	121.539 W.
Deer Creek	48.268 N.	121.931 W.	48.365 N.	121.793 W.
Deer Creek	48.715 N.	121.119 W.	48.721 N.	121.104 W.
Depot Creek	48.997 N.	121.323 W.	48.986 N.	121.292 W.
Devils Creek	48.825 N.	121.042 W.	48.819 N.	121.001 W.
Diobsud Creek	48.559 N.	121.411 W.	48.576 N.	121.432 W.
Duwamish River	47.586 N.	122.359 W.	47.474 N.	122.250 W.
East Duwamish Waterway	47.590 N.	122.343 W.	47.567 N.	122.346 W.
East Fork Bacon Creek	48.661 N.	121.433 W.	48.713 N.	121.416 W.
Eastern Shoreline Guemes Island	48.529 N.	122.572 W.	48.589 N.	122.645 W.
Eastern Shoreline Puget Sound (North)	48.511 N.	122.605 W.	49.000 N.	122.755 W.
Eastern Shoreline Puget Sound (South)	47.102 N.	122.727 W.	48.426 N.	122.674 W.
Eastern Shoreline Whidbey Island	47.905 N.	122.387 W.	48.370 N.	122.665 W.
Eastern Shoreline Lummi Island	48.641 N.	122.608 W.	48.717 N.	122.718 W.
Easy Creek	48.889 N.	121.457 W.	48.882 N.	121.455 W.
Ebey Slough	48.022 N.	122.147 W.	47.941 N.	122.169 W.
Finney Creek	48.524 N.	121.846 W.	48.465 N.	121.686 W.
Foss River	47.653 N.	121.293 W.	47.705 N.	121.305 W.
Fryingpan Creek	46.891 N.	121.601 W.	46.869 N.	121.649 W.
Gedney Island	00.000 N.	000.000 W.	48.013 N.	122.319 W.
Glacier Creek	47.987 N.	121.392 W.	47.987 N.	121.367 W.
Goat Island	00.000 N.	000.000 W.	48.363 N.	122.529 W.
Goodell Creek	48.672 N.	121.264 W.	48.778 N.	121.351 W.
Green River	47.474 N.	122.250 W.	47.299 N.	121.839 W.
Greenwater River	47.159 N.	121.659 W.	47.093 N.	121.457 W.
Hat Slough	48.197 N.	122.361 W.	48.209 N.	122.322 W.
Hope Island	00.000 N.	000.000 W.	48.399 N.	122.568 W.
Howard Creek	48.609 N.	121.965 W.	48.619 N.	121.965 W.
Huckleberry Creek	47.079 N.	121.585 W.	46.989 N.	121.622 W.
Hutchinson Creek	48.707 N.	122.178 W.	48.733 N.	122.102 W.
Ika Island	00.000 N.	000.000 W.	48.363 N.	122.501 W.
Illabot Creek	48.496 N.	121.530 W.	48.389 N.	121.318 W.
Indian Creek	48.947 N.	121.397 W.	48.935 N.	121.394 W.
Ipsut Creek	46.980 N.	121.832 W.	46.971 N.	121.831 W.
Jim Creek	48.185 N.	122.076 W.	48.216 N.	121.939 W.
Jones Creek	48.524 N.	122.052 W.	48.542 N.	122.050 W.
Kendall Creek	48.887 N.	122.148 W.	48.922 N.	122.144 W.
Klickitat Creek	46.909 N.	121.548 W.	46.903 N.	121.546 W.
Lake Union	Located at		47.651 N.	122.355 W.
Lake Washington	Located at		47.520 N.	122.236 W.
Lightning Creek	48.871 N.	121.027 W.	49.000 N.	120.978 W.
Little Beaver Creek	48.912 N.	121.064 W.	48.878 N.	121.322 W.
Little Chilliwack River	48.993 N.	121.407 W.	48.962 N.	121.477 W.
Lodi Creek	46.960 N.	121.705 W.	46.940 N.	121.687 W.
Maple Creek	48.912 N.	122.078 W.	48.927 N.	122.076 W.
Marble Creek	48.531 N.	121.281 W.	48.542 N.	121.251 W.
Middle Fork Nooksack River	48.834 N.	122.154 W.	48.725 N.	121.898 W.
Mowich River	46.901 N.	122.030 W.	46.915 N.	121.894 W.

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Newhalem Creek	48.671 N.	121.254 W.	48.663 N.	121.251 W.
Nisqually River	47.101 N.	122.691 W.	46.835 N.	122.323 W.
Nookachamps Creek	48.471 N.	122.296 W.	48.346 N.	122.202 W.
Nooksack River	48.771 N.	122.598 W.	48.834 N.	122.154 W.
North Fork Skagit River	48.364 N.	122.472 W.	48.387 N.	122.366 W.
North Fork Stillaguamish River	48.204 N.	122.126 W.	48.328 N.	121.639 W.
Panther Creek	48.708 N.	120.975 W.	48.631 N.	120.977 W.
Pass Creek	48.815 N.	121.462 W.	48.811 N.	121.457 W.
Peat Bog Creek (st. catalog # 0352)	48.790 N.	122.121 W.	48.780 N.	122.116 W.
Pierce Creek	48.774 N.	121.060 W.	48.766 N.	121.072 W.
Pilchuck River	47.904 N.	122.090 W.	47.995 N.	121.745 W.
Portage Island	00.000 N.	000.000 W.	48.701 N.	122.618 W.
Puyallup River	47.269 N.	122.425 W.	46.864 N.	121.949 W.
Ranger Creek	46.995 N.	121.853 W.	46.984 N.	121.854 W.
Rocky Creek	48.501 N.	121.494 W.	48.510 N.	121.501 W.
Roland Creek	48.762 N.	121.027 W.	48.770 N.	120.997 W.
Ruby Creek	48.737 N.	121.046 W.	48.707 N.	120.916 W.
Samish River	48.555 N.	122.456 W.	48.649 N.	122.207 W.
Sauk River	48.482 N.	121.604 W.	48.135 N.	121.422 W.
Silesia Creek	48.999 N.	121.612 W.	48.911 N.	121.484 W.
Silver Creek	48.972 N.	121.092 W.	48.981 N.	121.188 W.
Skagit River	48.387 N.	122.366 W.	49.000 N.	121.078 W.
Skookum Creek	48.671 N.	122.140 W.	48.686 N.	122.105 W.
Skykomish River	47.830 N.	122.045 W.	47.813 N.	121.578 W.
Smith Creek	48.856 N.	122.299 W.	48.841 N.	122.261 W.
Snohomish River	48.020 N.	122.208 W.	47.830 N.	122.045 W.
Snoqualmie River	47.830 N.	122.045 W.	47.541 N.	121.836 W.
South Fork Nooksack River	48.809 N.	122.202 W.	48.675 N.	121.940 W.
South Fork Skagit River	48.292 N.	122.367 W.	48.387 N.	122.366 W.
South Fork Skykomish River	47.813 N.	121.578 W.	47.705 N.	121.305 W.
South Fork Stillaguamish River	48.204 N.	122.126 W.	48.030 N.	121.482 W.
South Fork Tolt River	47.696 N.	121.820 W.	47.693 N.	121.692 W.
South Mowich River	46.915 N.	121.894 W.	46.871 N.	121.845 W.
South Pass	48.226 N.	122.385 W.	48.238 N.	122.377 W.
South Puyallup River	46.864 N.	121.949 W.	46.821 N.	121.846 W.
Southeastern Shoreline Vashon Island	47.331 N.	122.492 W.	47.349 N.	122.450 W.
Squire Creek	48.280 N.	121.684 W.	48.194 N.	121.637 W.
St. Andrews Creek	46.837 N.	121.920 W.	46.833 N.	121.864 W.
Steamboat Slough	48.033 N.	122.203 W.	47.984 N.	122.168 W.
Stetattle Creek	48.717 N.	121.148 W.	48.727 N.	121.154 W.
Stillaguamish River	48.238 N.	122.377 W.	48.204 N.	122.126 W.
Suiattle River	48.330 N.	121.548 W.	48.162 N.	121.005 W.
Sulphide Creek	48.777 N.	121.532 W.	48.789 N.	121.551 W.
Tenas Creek	48.324 N.	121.438 W.	48.335 N.	121.421 W.
Three Fools Creek	48.891 N.	120.973 W.	48.897 N.	120.847 W.
Thunder Creek	48.712 N.	121.105 W.	48.563 N.	121.026 W.
Tolt River	47.641 N.	121.926 W.	47.696 N.	121.820 W.
Union Slough	48.034 N.	122.190 W.	47.984 N.	122.166 W.
unnamed tributary (st. catalog #0217)	46.992 N.	121.704 W.	46.992 N.	121.714 W.
unnamed tributary (st. catalog #0226)	46.962 N.	121.710 W.	46.960 N.	121.717 W.
unnamed tributary (st. catalog #0234)	46.965 N.	121.712 W.	46.959 N.	121.711 W.
unnamed tributary (st. catalog #0364)	46.905 N.	121.559 W.	46.909 N.	121.573 W.
West Fork Foss River	47.653 N.	121.293 W.	47.627 N.	121.310 W.
West Fork White River	47.125 N.	121.618 W.	46.941 N.	121.707 W.
West Pass	48.250 N.	122.396 W.	48.238 N.	122.377 W.
White River	47.200 N.	122.257 W.	46.902 N.	121.636 W.

(ii) Map of Unit 28, Puget Sound, follows:

BILLING CODE 4310–55–P

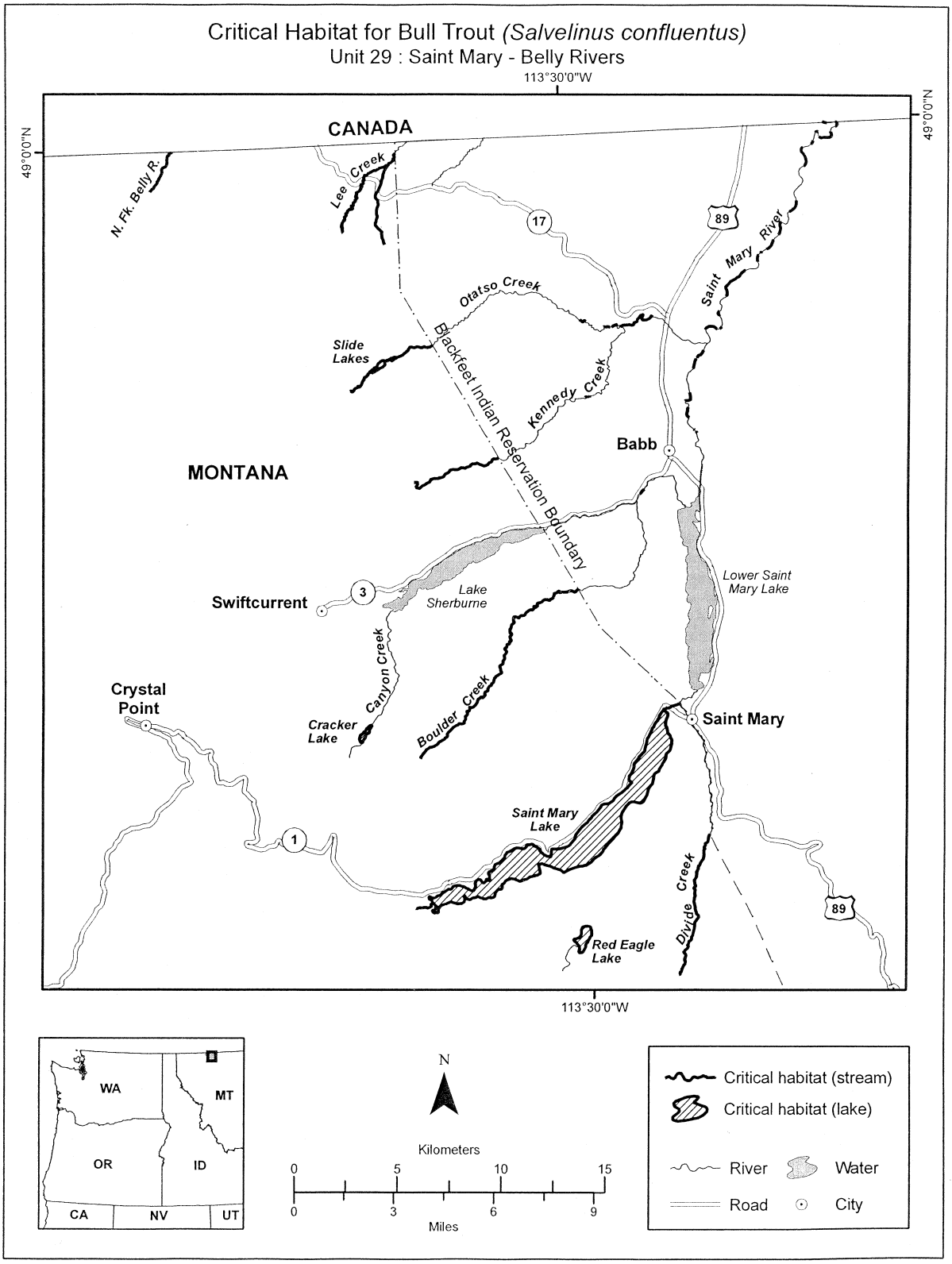

Critical Habitat for Bull Trout (Salvelinus confluentus)
Unit 28 : Puget Sound
123°0'0"W
122°0'0"W
121°0'0"W
49°0'0"N
48°0'0"N
47°0'0"N
CANADA
Strait of Georgia
Nooksack River
Bellingham
Lake Shannon
Mazama
Skagit River
Strait of Juan de Fuca
Port Angeles
WASHINGTON
Seattle
Lake Washington
Green River
White River
Puyallup River
Nisqually River
Olympia
Centralia
Wenatchee
Ellensburg
5
101
405
90
2
20
82
WA
MT
OR
ID
CA
NV
UT
N
Kilometers
0 30 60 90
0 20 40 60
Miles
Critical habitat (stream)
Critical habitat (lake)
Critical habitat (marine)
River
Water
Road
City

(26) Unit 29: Saint Mary-Belly.

(i) Critical habitat is designated on the water bodies listed in the following table:

Name	Stream endpoint latitude	Stream endpoint longitude	Stream endpoint latitude or lake center	Stream endpoint longitude or lake center
Boulder Creek	48.839 N.	113.459 W.	48.732 N.	113.608 W.
Cracker Lake	Located at		48.744 N.	113.643 W.
Divide Creek	48.751 N.	113.437 W.	48.634 N.	113.444 W.
Jule Creek	48.988 N.	113.613 W.	48.954 N.	113.617 W.
Kennedy Creek	48.905 N.	113.409 W.	48.851 N.	113.604 W.
Lee Creek	48.998 N.	113.600 W.	48.960 N.	113.644 W.
North Fork Belly River	48.998 N.	113.754 W.	48.981 N.	113.770 W.
Otatso Creek	48.915 N.	113.464 W.	48.892 N.	113.644 W.
Red Eagle Lake	Located at		48.651 N.	113.506 W.
Saint Mary Lake	Located at		48.685 N.	113.525 W.
Saint Mary River	48.998 N.	113.326 W.	48.668 N.	113.615 W.
Slide Lakes—lower pool	Located at		48.905 N.	113.615 W.
Slide Lakes—upper pool	Located at		48.901 N.	113.625 W.
Swiftcurrent Creek	48.836 N.	113.428 W.	48.828 N.	113.521 W.

(ii) Map of Unit 29, Saint Mary-Belly, follows:



Dated: September 15, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 05–18880 Filed 9–23–05; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Monday,
September 26, 2005

Part III

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 2, 10, et al.
Federal Acquisition Regulations; Proposed Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16, 32, and 52

[FAR Case 2004–015]

RIN 9000–AK32

Federal Acquisition Regulation; Payments Under Time-and-Materials and Labor-Hour Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the FAR regarding payments under Time-and-Materials (T&M) and Labor-Hour (LH) Contracts.

DATES: Interested parties should submit written comments to the FAR Secretariat on or before November 25, 2005, to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2004–015 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2004–015@gsa.gov*. Include FAR case 2004–015 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW., Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2004–015 in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal and/or business confidential information provided.

Public Meeting: A public meeting will be held on Tuesday, October 18, 2005, from 9:00 a.m. to 4:00 p.m. Eastern Time, in the GS Building Auditorium, 1800 F Street NW, Washington, DC 20405, to facilitate an open dialogue between the Government and parties interested in the implementation of section 8002(d), FAR Case 2003–027, Additional Contract Types. Because they are so closely related, the public meeting will also cover this FAR proposed rule 2004–015, Payment Under Time-and-Materials and Labor-Hour Contracts. Interested parties are encouraged to attend and engage in discussions regarding these proposed rules.

To facilitate discussions at the public meeting, interested parties are encouraged to provide written comments on issues they would like addressed at the public meeting no later than Tuesday, October 11, 2005. Interested parties may register and submit their input electronically at *http://www.acq.osd.mil/dpap/dars/index.htm*. Attendees are encouraged, but not required, to register for the public meeting, to ensure adequate accommodations.

Directions to the meeting can be found at the Web site. Participants are encouraged to check with the Web site prior to the public meeting to ensure the location has not been changed as a result of a large number of registrants. The public meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Jeremy Olson at 202–501–3221 at least 5 days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson, at (202) 208–3221. Please cite FAR case 2004–015.

SUPPLEMENTARY INFORMATION:

A. Background

The amendments made under this case are intended to be applicable only to non-commercial item contracts. Policies applicable to commercial item T&M or LH contracts are being addressed separately under FAR case 2003–027.

The proposed amendments to FAR 16.307, 16.601, 32.111, and the FAR clause at 52.232–7 are intended to amend the underlying policies and increase the clarity of the affected FAR language. The proposed rule addresses the areas related to payments made under T&M and LH contracts for non-commercial items, as described below.

1. FAR 16.307—Contract clauses.

The Councils are proposing to amend FAR 16.307(a)(1) to specify that the Allowable Cost and Payment clause is included in T&M contracts. The clause is only applicable to the portion of the contract that provides for reimbursement of materials at actual cost. This change is being made to ensure that appropriate rights and responsibilities are provided in T&M contracts with respect to reimbursement for material cost.

2. FAR 16.601—Time-and-materials contracts.

The Councils are proposing to revise the language at FAR 16.601(a) to provide a description of ''materials'' as used in ''time-and-materials contract.'' FAR 16.601(a) currently describes a T&M contract as a contract that provides for acquiring supplies or services on the basis of—

- Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and
- Materials at cost, including, if appropriate, material handling costs as part of material costs.

The current description does not address subcontract costs, even though such costs are often a significant part of the work performed and are provided for under the payments clause at FAR 52.232–7. Also, the description does not address other direct costs and applicable indirect costs other than material handling (*e.g.*, general and administrative expenses) that may be appropriate for the acquisition. Thus, the Councils are proposing to revise ''materials at cost'' to include ''direct materials, subcontracts for supplies and services, other direct costs, and applicable indirect costs''.

3. General structure of the FAR clause at 52.232–7—Payments under Time-and-Materials and Labor-Hour Contracts.

The Councils are proposing to amend the current paragraph (b) of the FAR clause at 52.232–7 to specify that the term ''materials,'' as used in the clause, includes direct materials, subcontracts for supplies and services, other direct costs, and applicable indirect costs (this is consistent with the proposed changes to FAR 16.601). Materials also include supplies and services transferred between divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control. The current language has caused significant confusion because it does not adequately describe what is included in ''materials.''

4. Contractor furnished material—Alternate I.

The Councils are proposing to move and amend the current Alternate I to paragraph (b)(3) of the clause. When a contractor furnishes its own materials that meet the definition of a commercial item at FAR 2.101, the price to be paid for such materials shall be the contractor's established catalog or the market price. The ability of the contractor to bill at such prices should not be dependent on a contracting officer decision as to whether an alternate clause should be included in the contract.

5. Profit or fee on materials.

The Councils are proposing to revise paragraph (b)(8) of the FAR clause at 52.232–7 to specifically state that the Government does not pay profit or fee to the prime contractor on materials (except for commercial items discussed in Item 4 above or as otherwise provided for in FAR 31.205–26). The Councils believe this is consistent with the historical intent of the clause and the concept of a T&M contract. The recovery of profit or fee is accomplished as part of the labor hour portion of the T&M/LH contract.

6. Billing subcontracts and interdivisional transfers for incidental supplies or services.

For subcontracts, the Councils are proposing to clarify that subcontracts for incidental services are to be reimbursed at the actual subcontract price, plus allowable indirect costs, per the requirements of the FAR clause at 52.216–7, Allowable Cost and Payment. For interdivisional transfers, the Councils are proposing to revise the language to limit reimbursement to the actual rates or commercial prices of the division performing the work.

7. Billing subcontracts and interdivisional transfers for services that comply with the labor hour requirements.

For services performed by employees of subcontractors, the Councils are proposing to amend the policies to provide the contracting parties two possible approaches that would be used depending on the contracting officer's determination of circumstances applicable to an individual procurement. The first approach includes coverage in the FAR clause at 52.232–7 applicable to subcontractors providing services compliant with the labor hour requirements of a T&M or LH contract. Under this approach, payment of subcontract costs would be at the contract fixed labor rate under the contract requirements applicable to the labor hour portion of the contract only if a subcontractor is listed in the payment clause.

The contracting officer can select the second available approach by inserting ''None'' in the clause, which would provide that any other labor provided by a subcontractor would be paid at actual cost (plus applicable indirect costs).

The Councils believe this two option approach is appropriate for the following reasons:

- The Government should have the authority to limit subcontractors that are authorized to perform labor hours to be paid at the LH rate under a T&M or LH contract.
  - o The authority should be independent of the approval/notification process in the ''Subcontracts'' clause.
  - o The limitation should appear as part of the T&M Payment clause and it should include (or refer to) the list of subcontractors approved to provide labor hours paid at the LH rate under the contract.
  - o If the prime contractor wishes to add a new subcontractor, the contracting officer would have to agree (and make any necessary adjustment to the LH rates as a result).
  - o Subcontracted labor hours paid at the LH rate should not be subject to further material handling fees or any other type of reimbursement of the sort authorized for material.
  - o Subcontracted labor hours paid at the LH rate must be accounted for and substantiated under the same standards as labor hours provided by the prime contractor.
- Subcontractors providing services that are ancillary to and not part of the LH portion of the contract should be paid actual costs, using the same procedures as are used for material (*e.g.*, crane operators subcontracted as part of installation services, and drivers subcontracted to provide transportation to LH workers).

8. Application of Prompt Payment Act.

The Councils are proposing to add the language at paragraph (i) of the FAR clause at 52.232–7 to include application of the Prompt Payment Act for interim payments under T&M and LH contracts for services. The Prompt Payment Act has applied to fixed-price contracts for services for many years. Congress also recently amended the Prompt Payment Act to include cost reimbursement contracts for services. The Councils believe that since the Prompt Payment Act is applicable to both fixed-price and cost reimbursement contracts for services, it should also be applicable to T&M and LH contracts for services.

B. Regulatory Planning and Review

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because Time and Material or Labor Hour contracts are commonly awarded to small businesses.

An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

Initial Regulatory Flexibility Analysis

1. *Description of the reasons why action by the agency is being considered.* This proposed rule would revise the Federal Acquisition Regulation to amend underlying policies and increase the clarity of payments made under T&M and LH contracts for non-commercial items.

2. *Succinct statement of the objectives of, and legal basis for, the proposed rule.* The objectives of the amendment are to ensure fair and reasonable prices under T&M contracts and to eliminate the ambiguity in T&M contracts that has been responsible for confusion over payment amounts for subcontractor provided labor.

3. *Description of, and, where feasible, estimate of the number of small entities to which the proposed rule will apply.* The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because T&M contracting is a common method of acquiring services from small entities. However, it is not feasible to estimate the number of small entities impacted.

4. *Description of projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* The current FAR policies require contractors to maintain records to support invoices presented to the Government for payment. Such records include original timecards, the contractor's timekeeping procedures, distribution of labor, invoices for material, and so forth. These are standard records maintained by any company, large or small, and the fact that the contract would require that these records be made available to the Government should not place any additional record keeping burden on the entity.

5. *Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.* There are no Federal rules

that duplicate, overlap or conflict with the proposed rule.

6. *Description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.* Significant alternatives to the proposed rule include:

- Not permitting any subcontractor to be paid at the labor hour rate and reimbursing all subcontractors at actual cost.
- Incorporating a list of each Other Direct Cost (ODC) into each T&M contract that would be authorized for reimbursement under that contract and prohibiting reimbursement of any other ODC.
- Not requiring a list of each Other Direct Cost (ODC) authorized for reimbursement and permitting any ODC to be reimbursed.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C 601, *et seq.* (FAR case 2004–015), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 16, 32, and 52

Government procurement.

Dated: September 19, 2005.

Gerald Zaffos,

Acting Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 16, 32, and 52 as set forth below:

1. The authority citation for 48 CFR parts 16, 32, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 16—TYPES OF CONTRACTS

2. Amend section 16.307 by revising paragraph (a)(1) to read as follows:

16.307 Contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.216–7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement contract (other than a facilities contract) or a time-and-materials contract (other than a contract for a commercial item) is contemplated. If the contract is with an educational institution, modify the clause by deleting from paragraph (a) the words ''Subpart 31.2'' and substituting for them ''Subpart 31.3.'' If the contract is with a State or local government, modify the clause by deleting from paragraph (a) the words ''Subpart 31.2'' and substituting for them ''Subpart 31.6.'' If the contract is with a nonprofit organization, other than an educational institution, a State or local government, or a nonprofit organization exempted under OMB Circular No. A–122, modify the clause by deleting from paragraph (a) the words ''Subpart 31.2'' and substituting for them ''Subpart 31.7.'' If the contract is a time-and-materials contract, the clause at 52.216–7 applies only to the portion of the contract that provides for reimbursement of materials (as defined in the clause at 52.232–7) at actual cost.

* * * * *

3. Amend section 16.601 by—

a. Redesignating paragraphs (a), (b), and (c) as (b), (c), and (d), respectively;

b. Adding a new paragraph (a); and

c. Revising newly redesignated paragraph (b)(2).

The added and revised text reads as follows:

16.601 Time-and-materials contracts.

(a) *Definitions for the purposes of Time-and-Materials Contracts.*

Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

Materials means—

(1) Direct materials, including supplies and services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(2) Subcontracts for supplies and services;

(3) Any other direct costs (*e.g.*, travel, computer usage charges, etc.); and

(4) Applicable indirect costs.

(b) * * *

(2) Actual cost for materials (except as provided for in 31.205–26(e) and (f)).

* * * * *

4. Revise section 16.602 to read as follows:

16.602 Labor-hour contracts.

Description. A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor. See 16.601(c) and 16.601(d) for application and limitations, respectively, for time and materials contracts that also apply to labor hour contracts.

PART 32—CONTRACT FINANCING

5. Amend section 32.111 in paragraph (a)(7) by—

a. Removing paragraph (i);

b. Redesignating paragraphs (ii) and (iii) as (i) and (ii), respectively; and

c. Revising newly designated paragraph (i).

The revised text reads as follows:

32.111 Contract clauses for non-commercial purchases.

(a) * * *

(7) * * *

(i) If a labor-hour contract is contemplated, the contracting officer shall use the clause with its Alternate I.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.232–7 by—

a. Revising the date of the clause;

b. Revising the introductory paragraph of the clause;

c. Revising paragraphs (a), (b), (d), and (e) of the clause;

d. Revising the heading of paragraph (h);

e. Adding paragraph (i); and

f. Removing Alternate I, and redesignating Alternate II as Alternate I and revising it to read as follows:

52.232–7 Payments under Time-and-Materials and Labor-Hour Contracts.

As prescribed in 32.111(a)(7), insert the following clause:

PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (DATE)

The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the Contracting Officer's authorized representative:

(a) *Hourly rate.* (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis.

(2) Vouchers may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer), to the Contracting Officer or authorized representative. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment and by individual daily job timecards, records that verify the employees meet the qualifications for the labor categories specified in the contract or other substantiation approved by the Contracting Officer.

(3) Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract,

and subject to the terms of paragraph (e) of this clause, pay the voucher as approved by the Contracting Officer. Unless otherwise prescribed in the Schedule, the Contracting Officer may unilaterally issue a contract modification requiring the Contractor to withhold amounts from its billings until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interests. The Contracting Officer may require a withhold of 5 percent of the amounts due under paragraph (a), but the total amount withheld for the contract shall not exceed $50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (f) of this clause.

(4) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated. Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract. If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(b) *Materials.* For the purposes of this clause—

(1) Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

(2) Materials means—

(i) Direct materials, including supplies and services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(ii) Subcontracts for supplies and services;

(iii) Any other direct costs (*e.g.*, travel, computer usage charges, etc.); and

(iv) Applicable indirect costs.

(3) If the Contractor furnishes its own materials that meet the definition of a commercial item at 2.101 of the FAR, the price to be paid for such materials shall be the Contractor's established catalog or the market price, adjusted to reflect the—

(i) Quantities being acquired; and

(ii) Actual cost of any modifications necessary because of contract requirements.

(4) *Subcontracts.* (i) Unless the subcontractor is listed in paragraph (b)(4)(ii) of this clause, subcontract costs will be reimbursed at actual costs as specified in paragraph (b)(5).

(ii) Provided the subcontract agreement requires the Contractor to substantiate the subcontract hours and employee qualification, the Contractor shall be reimbursed at the hourly rates prescribed in the schedule for the following subcontractors:

[*Insert subcontractor name(s)or, if no subcontracts are to be reimbursed at the hourly rates prescribed in the schedule, insert ''None.''*]

[*If this is an indefinite delivery contract, the Contracting Officer may insert ''Each order must list separately the subcontractor(s) for that order or, if no subcontracts under that order are to be reimbursed at the hourly rates prescribed in the schedule, insert 'None'.''*]

(5) Except as provided for in paragraphs (b)(3) and (4) of this clause, the Government will reimburse the Contractor for allowable cost of materials provided the Contractor—

(i) Has made payments for materials in accordance with the terms and conditions of the agreement; or

(ii) Makes these payments within 30 days of the submission of the Contractor's payment request to the Government and such payment is in accordance with the terms and conditions of the agreement or invoice.

(6) Payment for materials is subject to the Allowable Cost and Payment clause of this contract. The Contracting Officer will determine allowable costs of materials in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract.

(7) The Contractor may include allocable indirect costs and other direct costs to the extent they are—

(i) Comprised only of costs that are clearly excluded from the hourly rate;

(ii) Allocated in accordance with the Contractor's written or established accounting practices; and

(iii) Indirect costs are not applied to subcontracts listed in paragraph (b)(4) for reimbursement at the labor hour rate.

(8) To the extent able, the Contractor shall—

(i) Obtain direct materials and subcontracts at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(ii) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits. When unable to take advantage of the benefits, the Contractor shall promptly notify the Contracting Officer and give the reasons. The Contractor shall give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor. The Contractor shall not deduct from gross costs the benefits lost without fault or neglect on the part of the Contractor, or lost through fault of the Government.

(9) Except as provided for in 31.205–26(e) and (f) of the FAR, the Government will not pay profit or fee to the prime contractor on materials.

(10) If the Contractor enters into any subcontract that requires consent under the clause at 52.244–2, Subcontracts, without obtaining such consent, the Government is not required to reimburse the Contractor for any costs incurred under the subcontract prior to the date the Contractor obtains the required consent. Any reimbursement of subcontract costs incurred prior to the date the consent was obtained shall be at the sole discretion of the Government.

* * * * *

(d) *Ceiling price.* The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(e) *Audit.* At any time before final payment under this contract, the Contracting Officer may request audit of the vouchers and supporting documentation. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding vouchers, that are found by the Contracting Officer not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. Upon receipt and approval of the voucher designated by the Contractor as the ''completion voucher'' and supporting documentation, and upon compliance by the Contractor with all terms of this contract (including, without limitation, terms relating to patents and the terms of (f) and (g) of this section), the Government shall promptly pay any balance due the Contractor. The completion voucher, and supporting documentation, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

* * * * *

(h) *Interim payments on contracts for other than services.* * * *

* * * * *

(i) *Interim payments on contracts for services.* For interim payments made prior to the final payment under this contract, the Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(End of clause)

Alternate I (Date). If a labor-hour contract is contemplated, the Contracting Officer shall add the following paragraph (i) to the basic clause:

(i) The terms of this clause that govern reimbursement for materials furnished are considered to have been deleted.

[FR Doc. 05–18964 Filed 9–23–05; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 10, 12, 16, 44, and 52

[FAR Case 2003–027]

RIN 9000–AK07

Federal Acquisition Regulation; Additional Contract Types

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 1432 of the National Defense Authorization Act for Fiscal Year 2004. Title XIV of the Act, referred to as the Services Acquisition Reform Act of 2003 (SARA), amended section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (FASA) to expressly authorize the use of time-and-materials (T&M) and labor-hour (LH) contracts for certain categories of commercial services under specified conditions.

DATES: Interested parties should submit written comments to the FAR Secretariat on or before November 25, 2005, to be considered in the formulation of a final rule.

Public Meeting: A public meeting will be held on Tuesday, October 18, 2005, from 9 a.m. to 4 p.m. Eastern Time, in the GS Building Auditorium, 1800 F Street NW, Washington, DC 20405, to facilitate an open dialogue between the Government and parties interested in the implementation of section 8002(d). Because they are so closely related, the public meeting will also cover proposed rule, FAR case 2004–015, Payment Under Time-and-Materials and Labor-Hour Contracts. FAR case 2004–015 is published as the next item following this publication. Interested parties are encouraged to attend and engage in discussions regarding these proposed rules.

To facilitate discussions at the public meeting, interested parties are encouraged to provide written comments on issues they would like addressed at the public meeting no later than Tuesday, October 11, 2005. Interested parties may register and submit their input electronically at *http://www.acq.osd.mil/dpap/dars/index.htm*. Attendees are encouraged, but not required, to register for the public meeting, to ensure adequate accommodations.

Directions to the meeting can be found at the Web site. Participants are encouraged to check with the Web site prior to the public meeting to ensure the location has not been changed as a result of a large number of registrants. The public meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Jeremy Olson at 202–501–3221 at least 5 days prior to the meeting.

ADDRESSES: Submit comments identified by FAR case 2003–027 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web Site: *http://www.acqnet.gov/far/ProposedRules/proposed.htm*. Click on the FAR case number to submit comments.
- E-mail: *farcase.2003–027@gsa.gov*. Include FAR case 2003–027 in the subject line of the message.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2003–027 in all correspondence related to this case. All comments received will be posted without change to *http://www.acqnet.gov/far/ProposedRules/proposed.htm*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Jeremy Olson at (202) 501–3221. Please cite FAR case 2003–027.

SUPPLEMENTARY INFORMATION:

A. Background

Section 8002(d) limits use of T&M and LH contracts to the following categories of commercial services:

- Commercial services procured for support of a commercial item, as described in 41 U.S.C. 403(12)(E); and
- Any other category of commercial services that is designated by the Administrator of OFPP on the basis that—

1. The commercial services in such category are of a type of commercial services that are commonly sold to the general public through use of T&M or LH contracts; and

2. It would be in the best interests of the Federal Government to authorize use of T&M or LH contracts for purchase of the commercial services in such category.

In furtherance of its statutory responsibilities, OFPP worked in coordination with the Councils on a series of questions for the Advance notice of proposed rulemaking and notice of public meeting published in the **Federal Register** on September 20, 2004 (69 FR 56316), to obtain information describing how T&M and LH contracts are used commercially. In particular, the questions elicited information on the types of services that are commonly acquired on this basis and the circumstances under which these arrangements are used. Interested parties offered a variety of written observations in response to these questions. The public comments are discussed in greater detail below. In addition, a number of interested parties provided oral comments during a public meeting that was held on October 19, 2004, to facilitate an open dialogue with Government procurement policy officials.

OFPP and several members of the Acquisition Strategy Team also received an oral briefing from the Government Accountability Office (GAO) on a survey the GAO conducted late last year to determine how often commercial companies use T&M and LH contracts in their commercial practices, either as a buyer or a provider. The GAO received 23 responses to its survey. Some of the responses came from Fortune 500 companies. Although responses were limited, the GAO indicated that they represented buying practices from a relatively wide range of industries, including: airline, automotive and truck manufacturers, automotive and truck parts, business services, communications equipment, computer hardware, computer services, electric utilities, insurance, major drugs (pharmaceutical), money center bank, non-profit financial services, oil and gas, regional bank, retail (grocery and technology), scientific and technical instruments, and semiconductor.

OFPP made three main findings from these inputs. First, commercial services are commonly sold on a T&M and LH basis in the marketplace when requirements are not sufficiently well understood to complete a well-defined scope of work and when risk can be managed by maintaining surveillance of costs and contractor performance. Second, these same services are also

generally offered on a fixed-price basis. Third, a few types of services are sold predominantly on a T&M and LH basis-specifically, emergency repair services.

Based on these findings, OFPP recommended to the Councils that the proposed rule allow an agency to purchase any commercial service on a T&M or LH basis if it has completed a determination and findings (D&F) containing sufficient facts and rationale to justify that a firm-fixed pricing arrangement is not suitable. OFPP stated that this conclusion is consistent with the statutory requirement in 8002(d) that contracting officers must execute a D&F that establishes that no contract type other than a T&M and LH contract is suitable before pursuing one of these arrangements. The agency would also need to comply with the other limitations set forth in 8002(d)-*i.e.*, the service is acquired under a contract awarded using competitive procedures, the contract or order includes a ceiling price that the contractor exceeds at its own risk, and any subsequent change in the ceiling price is authorized only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

With respect to the contents of the D–F, OFPP advised the Councils that the rationale supporting use of a T&M or LH contract for commercial services should establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of certainty. As noted in the findings above, this condition typically appears to exist in circumstances where the private sector commonly turns to T&M and LH contracting. And, this condition always appears to exist for services that are predominantly purchased on a T&M and LH basis, such as emergency repair services-*i.e.*, emergency repair services, by their very nature, are difficult to capture in a well-defined scope of work and therefore are not generally conducive to purchase on a fixed-price basis. In addition, if the need is of a recurring nature and is being acquired through a contract extension or renewal, OFPP expects, consistent with FAR 7.104(h), that the D&F reflect why knowledge gained from the prior acquisition could not be used to further refine requirements and acquisition strategies in a manner that would enable purchase on a fixed-price basis. OFPP believes that these steps will help ensure that T&M and LH contracts are used only when in the best interests of the government, as envisioned by section 8002(d)(3)(B)(ii).

Finally, the Councils invite the public to provide additional comment that might further inform OFPP's findings and conclusions. Respondents are encouraged to include citations, as appropriate, to relevant sources of information that may be used to substantiate the basis for the response provided.

The Councils have shaped the proposed rule to reflect OFPP's recommendations.

Comments were received from 23 respondents in response to the ANPR. The Councils considered all of the comments and recommendations in developing the proposed rule. The Councils made the following changes to the rule as a result of the public comments and Council deliberations:

1. REVISED FAR 12.207(b) to be consistent with OFPP's determination not to develop a list of commercial services that are commonly sold to the general public on a T&M basis.

2. REVISED FAR 12.207(b)(3) to be consistent with the requirements for noncommercial T&M/LH contracts and to emphasize that requirements should be structured so as to ''maximize the use of fixed price contracts'' to be consistent with the statutory language.

3. REVISED FAR 12.301(b)(3) to prohibit tailoring of the consent to subcontract provisions in paragraph (u) of Alternate I of the FAR clause at 52.212–4 (except to require individual orders to be addressed individually under indefinite delivery contracts) because the Councils believe tailored subcontract provisions may not adequately protect the Government.

4. REVISED FAR 44.303 to specify that only firm-fixed price or fixed-price with economic price adjustment contracts awarded for commercial items under FAR Part 12 are excluded from Contractor Purchasing System Reviews (CPSR) to assure that the CPSR includes commercial T&M/LH contracts thereby providing contractors the flexibility to award commercial T&M/LH subcontracts without the otherwise required subcontract consent.

5. DELETED the language in paragraph (a) of the FAR clause at 52.212–4 that allowed the Government to require the contractor to ensure future performance conforms to contract requirements because the Councils believe that this language is unnecessary since the Government already has this right through the use of a cure notice and ADD language to clarify that the Government may seek either ''an equitable price adjustment'' or ''adequate consideration'' for acceptance on nonconforming supplies or services.

6. *Alternate I to FAR clause 52.212–4*—

a. REVISED paragraph (a) to allow contractors to be paid for reperformance, without profit, up to the ceiling price to be consistent with the provisions for noncommercial T&M contracts, *i.e.*, paragraphs (c) through (k) of the FAR clause at 52.246–6, Inspection—Time-and-Material and Labor-Hour. However, since contracting officers will not necessarily know the portion of profit in the labor rates for these competitive awards, the Councils revised paragraph (a)(4) of the clause to require contracting officers to identify the portion of profit in the ''hourly rate'' and included a 10 percent default if not otherwise specified in the clause. The Councils note that 10 percent default is arbitrary and not necessarily representative of the actual portion of profit in the labor rates; however, the Councils believe it is advisable to establish a default for instances where contracting officers fail to provide a specific decrement.

b. RELOCATED definitions previously located in paragraph (u) to paragraph (e) to be consistent with the new format of the basis clause and ADDED a new definition for ''materials'' to recognize that the term has different meaning for T&M contracts, *i.e.*, materials include other direct and indirect costs.

c. DELETED the requirement in paragraph (i)(1)(i)(A) that only permitted reimbursement of fractional hours if the contract specifically authorized fractional hours because the Councils believe contractors should be paid for fractional hours on a prorated basis.

d. REVISED paragraph (i)(1)(i)(B) to specify that contractors shall substantiate subcontractor hours reimbursed at the hourly rate in the schedule when requested by the contracting officer and to specify the payment records that may be requested to substantiate the labor.

e. REVISED the material cost provisions at paragraph (i)(1)(ii) to—

1. Permit payment at the contractor's established catalog or market price for materials that meet the definition of a commercial item.

2. Permit reimbursement of subcontract costs at the hourly rate specified in the schedule in certain situations.

3. Delete the requirement to take all discounts, rebates, allowances, etc. to be more consistent with commercial practices. However, when the contractor receives the benefit of such discounts, rebates, or allowances, the Government must receive appropriate credit.

4. Eliminate the ''most favored customer'' requirement to be consistent with the allowability provision for material costs at 31.205–26(f).

5. Add provisions to permit reimbursement of other direct costs on a cost basis only to the extent such costs are listed in the contract clause so the Government will know the ''types of costs'' a contractor might subsequently bill as other direct costs.

6. Add provisions for reimbursement of indirect costs at a fixed amount to the extent such reimbursement are listed in the contract clause to permit reimbursement without imposing the requirements of FAR Part 31.

f. REVISED the access to records provisions at paragraph (4) to allow the Government to review records of employee qualifications and changed terminology from ''records of distribution of labor'' versus ''labor distribution reports'' to be more consistent with commercial practices.

g. ELIMINATED the requirements at paragraph (i)(5) for Assignment of Refunds, Rebates and Credits because the Councils believe the applicable credits are adequately covered in paragraph (i)(1)(ii).

h. REVISED paragraph (u)(8), to clarify that payment of subcontract costs incurred prior to the date of any required subcontract consent will only be reimbursed if the contracting officer subsequently provides the consent.

Disposition of Public Comments

1. *Types of Commercial Services Sold on a T&M/LH Basis*.

a. *Predominately Sold on T&M or LH Basis*. One commenter said that T&M contracts are predominately used when the work effort to complete is extremely difficult or impossible to determine at the time the contract is executed and when the customer does not have a complete definition of the final or expected result. Another commenter said commercial T&M/LH contracts are appropriate when it is not possible for the buyer/seller to estimate accurately the resources required for performing and neither party can assume the financial risks for performance. Another commenter said the commercial marketplace regularly acquires support on a fixed rate per day or hours basis. In addition, various commenters identified the following specific services as a type of commercial service predominately sold on a T&M or LH basis:

1. Emergency Response.
2. Repairs.
3. Information Technology.
4. Professional.
5. System Integration.
6. Program Management.
7. Software Development.
8. Facilities.
9. Legal.
10. Accounting and Auditing.
11. Cleaning.
12. Consulting.
13. Business Advisory.
14. Financial Management.
15. Project Management.
16. Training.
17. Certain building trades (e.g., painters).
18. Quality Assurance.
19. Moving.
20. Installation.
21. Support.
22. Engineering.
23. Wind Tunnels.
24. Troubleshooting.
25. Miscellaneous Testing.
26. Pilot.

b. *Rarely Sold on a T&M or LH Basis*. One commenter said T&M/LH contracts are rarely used when the extent of the work effort to complete is clearly understood and definable, *i.e.*, the customer is able to clearly and accurately define the work.

c. *Commonly Sold as Both T&M/LH and Fixed Price*. One commenter said commonly sold commercial T&M/LH services can also be sold as fixed-price, under different circumstances, and that the customer's ability to specify required services/needs should be the basis for determining the use of commercial T&M/LH contracts. Another commenter said professional architectural and engineering design services, and consulting services are commonly sold on both a T&M/LH and fixed price basis.

Response: The Councils appreciate the public input and has fully considered it in formulating the types of services that are appropriate for commercial T&M/LH contracts.

2. *Appropriate Use*.

a. One commenter said the Government should conduct a thorough review of actual commercial buying practices to substantiate that T&M/LH contracts are used in the private sector rather than assuming and asserting that the use of T&M/LH contracts are a standard commercial practice.

Response: The FAR rule implements the statute that authorizes the use of T&M contracts for commercial services. The Councils note that the ANPR requested information from the public to better ensure that the implementation applies only to services that are commonly sold on a commercial basis as required by the statute. The Councils believe the public's input and the statute provide a sufficient basis for developing appropriate FAR coverage.

b. One commenter said the language at FAR 12.207(b)(3)(iii) that minimizes the use of T&M and LH contracts to the *maximum* extent practicable comes close to defeating the purpose of the original legislation. The commenter also said that the rule does not convey Congress's intent because the SARA legislation required maximum use of fixed price contracts and the ANPR indicates that the D&F is to demonstrate that a Government requirement is described in such a way as to *minimize* the use of T&M and LH contracts.

Response: The Councils recognize that the language should focus on maximizing fixed price contracts for commercial items. Therefore, the Councils revised the rule to establish the requirement in a way that will maximize the use of fixed price contracts, *e.g.*, by limiting the value or length of the current T&M/LH contracts or orders.

c. One commenter questioned the need to restrict commercial T&M and LH contracts to competitive circumstances because there may be situations where sufficient controls are in place to acquire services using procedures other than competition.

Response: Section 1423 of Public Law 108–136 stipulates commercial T&M and LH contracts must be made on a competitive basis.

d. One commenter recommended that the Councils clarify that the fair opportunity requirements of FAR 16.505 apply to commercial task order T&M contracts.

Response: The provisions at FAR 16.505 apply to commercial task order T&M contracts. Nothing in this rule requires that each task order be subject to full and open competition.

e. One commenter said the FAR Council solicited responses at the public meeting regarding whether commercial services task orders awarded on a noncompetitive basis should be eligible to be awarded under T&M/LH vehicles. The commenter has legal and policy objections to sole-source procurements being awarded under T&M/LH vehicles since SARA extended only to competitive procurements.

Response: The Councils acknowledge noncompetitive contract awards were discussed at the public meeting; however, noncompetitive awards were only discussed to obtain input on what constitutes competition. As stated in the ANPR and the rule, the awards must be made on a competitive basis.

f. One commenter said that use of competition and a ceiling does not adequately protect the Government from abuse because competition is an ''illusionary protection'' as

demonstrated by the General Services' schedules and task orders under IDIQs since ''in practice, they are mostly awarded on a sole source basis.''

Response: The commenter is concerned about compliance with the rule rather than promulgation of the rule itself. The rule requires use of competition in accordance with the statutory requirement for use of T&M contracts for commercial services. The commenter did not state that true competition is a problem, but merely assumes that such competition will not be obtained, *i.e.*, procuring components will not comply with the FAR requirements. Issues regarding compliance with the FAR are beyond the scope of the Councils; however, the Councils note that the assumption in promulgating the FAR is that it will be properly applied.

g. One commenter recommended eliminating the phrase ''of a type'' in FAR 12.207(b)(2)(ii)(A) since it cannot be uniformly defined and is confusing. The commenter believes eliminating the phrase will ensure that the services being purchased are truly commercial and not just a stretch of someone's imagination.

Response: The term ''of a type'' is part of the regulatory definition of a commercial item and also part of the statutory requirement that provides for use of T&M contracts for commercial items. Therefore, the Councils believe it is not appropriate to eliminate this phrase from this rule or FAR.

h. One commenter said the rule should limit services bought on T&M and LH contracts under FAR Part 12 to those that are truly commercial in nature and commonly sold in the commercial markets and restrict the use of commercial item T&M/LH contracts for requirements with large material components.

Response: The rule restricts the use to commercial services that are commonly sold to the general public through use of a T&M/LH contract. The Councils agree a commercial T&M/LH contract may not be the most suitable contract type when material costs are a significant cost of the acquisition. However, the Councils believe imposing strict limits on the material component would unnecessarily restrict the contracting officer's flexibility and discretion when responding to a specific requirement. The Councils note that the rule adopts the same procedures for noncommercial T&M contracts in FAR Subpart 16.6.

i. One commenter said the definition of what qualifies as a commercial service should be broad in scope and recommended requiring an affirmative determination by the contracting officer instead of developing a comprehensive list. Another commenter recommended adding the type(s) of service to a general list of subject areas to be considered when choosing a T&M or LH contract but not adding examples (consulting, training, etc.) because doing so might result in premature decisions for T&M or LH applicability. Another commenter recommended using broad categories, such as Federal supply codes or three-digit NAICS, so as not to limit implementation of public law because there are innumerable services that could be procured on a T&M/LH basis. Conversely, one commenter recommended adding a clear definition of commercial service with concrete examples. Another commenter said SARA requires OFPP to formulate a list of services typically sold on a T&M/LH basis commercially and that the list is needed because some contracting officers may be limited in their ability to properly determine whether the service could be bought on a T&M/LH basis. Another commenter said the rule should not go beyond the statutory language in describing the type of service(s) that may be procured under T&M contracts. Another commenter said the rule is incomplete because the rule authorizes use of T&M/LH contracts to acquire any other category of commercial services identified by OFPP but the rule does not identify where the OFPP determination will be posted or how it will be communicated to agencies.

Response: The Council note that many of the attendees at the public meeting expressed the view that a comprehensive list of commercial services would be overly restrictive and impractical. The Councils agree that developing and maintaining a comprehensive list is not practical or feasible because many services may be sold on both a T&M/LH and fixed price basis depending on the circumstances of the acquisition. Further, the Councils note that the ANPR did not identify a location for the ''OFPP determination'' because the Councils intended to revise the rule when OFPP made its determination. As OFPP has now made its determination, the Councils revised the rule to reflect that determination, *i.e.*, the rule allows agencies to purchase any commercial service on a T&M/LH basis when the agency has completed a D&F containing sufficient facts and rationale to justify that a FFP arrangement is not suitable.

j. One commenter said the term ''predominantly'' should not be used in lieu of the term ''commonly'' since they have distinctively different meanings.

Response: The **Federal Register** notice requested input on T&M services ''predominately'' and ''commonly'' sold on a T&M/LH basis to obtain additional insight into the use of T&M contracts for commercial services. The Councils agree the terms have different meaning and notes that the term ''predominately'' is not used in the provisions discussed in the ANPR or the rule.

k. One commenter suggested adding the ''type of work'' or ''type of skills needed'' to the list of considerations for deciding whether other contract types authorized by FAR 12.207 are suitable instead of limiting the determination to situations where it is not possible at the time of award to estimate accurately the extent or duration of work stating many times the Government's requirements quickly evolve after award. Another commenter said the rule should not adopt the rule in the GSA Multiple Award Schedule because T&M and LH contracts are advantageous to the Government since profit is defined and limited. Another commenter recommended revising the coverage at FAR 12.207(b)(3)(ii)(A) for when a T&M/LH contract is suitable by inserting either the word ''some'' or ''certain'' in front of the word ''costs'' at the beginning of the fifth line to specify that only ''some'' or ''certain'' costs cannot be anticipated with a reasonable degree or certainty since contracting officers are required to determine that the contract award amount is fair and reasonable. Three commenters said the situations when T&M/LH contracts can be used should be the same for commercial and noncommercial acquisitions.

Response: The ANPR language at FAR 12.207(b)(3)(ii)(B) that would have allowed use of commercial T&M/LH contracts when the work is sufficiently understood to allow for fixed pricing was intended to clarify that there were only two pricing arrangements for commercial items, fixed price (*i.e.*, firm-fixed price and fixed price with economic price adjustment) and T&M/LH. The Councils agree the situations for appropriate use of commercial T&M/LH contracts should be the same as the situations that permit noncommercial T&M/LH contracts. As the additional language appears to have caused confusion, the Councils eliminated the requirements at FAR 12.207(b)(3)(ii)(B). The rule is now identical to the requirements to FAR Subpart 16.6 (noncommercial) and MAS special ordering procedures which restrict T&M contracts to situations where it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work to

anticipate costs with any reasonable degree of confidence.

l. Two commenters said the Government should not assume that T&M contracts can only be used when the entire effort is T&M since contracts that are predominately firm-fixed price can also include T&M items.

Response: Neither the FAR, nor this rule, preclude the use of ''hybrid'' contracts, *i.e.*, contracts with mixed contract types. Therefore, additional authority is not needed. However, the Councils note that contracting officers must adequately document why no other contract type is suitable for the T&M portion of the contract in the supporting D&F.

m. One commenter said offerors should be allowed the flexibility to propose both fixed price and T&M solutions and that the contracting officer could analyze and decide which offer is most cost effective and advantageous to the Government.

Response: The Councils believe contracting officers will conduct adequate market research to determine the appropriate contract type and notes that T&M contracts are only authorized when no other contract type is suitable. The solicitation must identify the anticipated contract type so offerors will know the terms and conditions that apply to the solicitation and can price their offers accordingly. Additionally, the solicitation must specify the evaluation factors that will be used to determine the successful offeror so that all offerors are on equal footing since evaluation factors, like proposed prices, vary depending on the contract type. The Councils note that existing FAR provisions allow contracting officers to solicit alternate proposals.

n. One commenter noted that T&M contracts represent more risk to the buyer than firm fixed price contracts and said differences in Federal and State court interpretations of critical performance aspects, especially the ability of the buyer to enforce firm deliverables and warranties, may explain why the rule limits the use of T&M or LH contracts to when ''no other contract type is suitable.'' The commenter said that Federal courts have often found that the buyer cannot enforce firm deliverables or warranties under T&M and LH contracts, which makes these contract types inherently risky for the Government. Conversely, State courts, applying the principles of the Uniform Commercial Code, typically do not make distinctions between T&M/LH and FFP contracts in regard to the buyer's rights to firm deliverables and warranties. The commenter further recognized that a continued bias in favor of fixed price contracts for acquisition of commercial services under FAR Part 12 is in order. However, the commenter recommended that the Councils fully understand the important distinctions made by the Courts before implementing the rule.

Response: The Councils agree that T&M contracts comprise the highest contract type risk to the Government. As such, they should only be used when no other contract type is suitable. The Councils recognize there are Court opinions regarding deliverables and warranties. However, the issue of deliverables and warranties does not factor into the decision to use a T&M contract. The key factor in deciding to use a T&M contract is the ability to accurately estimate the extent or duration of the work or anticipate costs with any reasonable degree of certainty.

o. One commenter said there is a clear separation between projects that are obviously suited for FFP (defined scope development or implementation) and those suited for T&M (design consulting services, quality assurance, security, auditing, etc.) and that there is little chance that the rule would drive contracts away from FFP.

Response: Since commercial T&M contracts are not currently authorized by the FAR, the Councils are unable to determine whether the rule will ''drive contracts away from FFP.'' In accordance with the rule, T&M/LH contracts are only authorized when the contracting officer determines that no other contract type is suitable which should assure that the rule does not ''drive contracts away from FFP''.

p. One commenter said contracting officers should be provided guidance on sources and specific instructions for conducting market research to evaluate options and rationale for not using fixed-prices for delivery of services.

Response: The discussion of market research is included in FAR Part 10, Market Research. The FAR does not provide specific instructions or sources for conducting market research since this will vary with different types of acquisitions. Such specific instructions and sources are more appropriately contained in agency training materials and guidance.

q. One commenter said the rule should be revised to emphasize that market research is performed to establish why T&M is the appropriate contract type for a particular requirement. Another commenter said the market research procedures in FAR Part 10 will be an effective way to determine whether it is feasible to purchase services on a fixed-price basis or a T&M/ LH basis. Another commenter said market research should be limited to a determination of whether the desired services are commercial which could result in solicitation of both fixed-price and T&M contracts. Another commenter noted that contracting officers should rely on market analysis to identify services typically sold commercially since market analysis, coupled with documentation that the scope or duration of work is not sufficiently clear, should be sufficient to establish that a fixed-price contract is not suitable.

Response: The Councils agree market research is an effective way to determine whether purchases can be made on a T&M/LH or FFP basis and notes that the ANPR and the proposed rule require agencies to determine commercial practices, including contract type, during market research. The Councils do not believe additional coverage is needed.

r. One commenter recommended revising FAR Parts 7 and 37 to require Government personnel to evaluate the existing requirements and market conditions and adapt the strategy needed to address them.

Response: Government personnel are required to conduct market research, which includes evaluating the existing requirements and market conditions, to determine the most suitable approach to acquiring, distributing, and supporting the needed supplies or services. The Councils do not believe additional coverage is needed.

s. One commenter recommended that the Councils amend Part 12 to exclude applied research since established catalog or market prices cannot exist because the primary objective of this type of research is to advance scientific knowledge not yet existing in the marketplace. The commenter noted that the Deputy Inspector General for Auditing had previously identified the inappropriate use of FAR Part 12 in procurement of applied research in Report No. D2001–051, ''Use of Federal Acquisition Regulation (FAR) Part 12 Contracts for Applied Research,'' dated February 15, 2001.

Response: Applied research is a service that is performed on a T&M/LH basis in the commercial marketplace. The acquired scientific knowledge is the result of the research services.

t. One commenter said contracting officer should be given discretion in making an award on the basis of an overall evaluation of the proposal, which presumably includes rates, technical approach to performing the work, price, etc., and that price alone should not be the deciding factor.

Response: The Councils agree that price alone is not necessarily the sole or key factor in making an award. However, the rule does not need to be changed since FAR Part 12 already requires the contracting officer to use the provisions in FAR 15.101 and 15.304, which provide criteria to be used in making the award. The criteria states that the relative importance of price will vary with different types of acquisitions.

u. One commenter believes award fees and performance or delivery incentives fees provisions at FAR 12.207(d) should only be used in contracts for commercial services when use of such fees are consistent with commercial practices.

Response: The Councils see no reason to limit the use of award fees and performance or delivery incentives to be consistent with commercial practices. The Government uses award fees and incentives to motivate contractor efforts that might not otherwise be emphasized in order to meet specific acquisition objectives. While the use of award fees and incentives may not be customary in all commercial industries, the Councils believe similar incentives are generally used in the commercial marketplace when appropriate.

v. One commenter encouraged the ''abandonment of CPFF contracts for commercial services in favor of T&M'' and urged approval of the rule.

Response: Cost type commercial contracts are prohibited by statute.

w. One commenter at the public meeting said the rule should apply only at the prime contract level since the commercial sector does not compete awards at the subcontract level.

Response: The rule does not change how commercial contractors price subcontracts. As always, commercial contractors can use T&M contracts. However, the Councils believe commercial contractors often award subcontracts on a competitive basis.

x. One commenter at the public meeting asked how contracting officers determine what is ''in scope'' for the purpose of issuing change orders since T&M contracts do not always specify an outcome.

Response: The procedures for determining what is ''in scope'' for commercial T&M contracts are the same as those used for noncommercial T&M contracts. While T&M contracts do not always specify an outcome, they do specify the contract requirements. Determining whether the change is ''in scope'' or ''out of scope'' will be based on the requirements in the contract. The Councils note that work is within the scope of the contract if it is regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into.

y. One commenter at the Public Meeting asked if fixed-price contracts with prospective price redetermination contracts could serve the same purpose for many contracts that are awarded on a T&M basis.

Response: Fixed-price contracts with prospective price redeterminations may be used in acquisitions of quantity production or services when it is possible to negotiate a fair and reasonable firm fixed price for an initial period, but not for subsequent periods of contract performance (see FAR 16.205–2). Conversely, a T&M contract can only be used when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence (see FAR 16.601(b)). The appropriate contract type will be based on the specific circumstances of the acquisition.

3. *Determination and Finding (D&F).*

a. One commenter said the requirement for a D&F for every CLIN or order would be unduly burdensome to contracting officers and instead recommended revising the acquisition planning process and associated documentation requirements to address the possibility or probability for using T&M and LH based on the analysis of the requirement and market research. Another commenter said a D&F is needed for each task order. Another commenter said that the rule could be drafted to make it less onerous for developing and approving D&Fs and that the requirement for a D&F for each order when the IDIQ contract provides for both FP and T&M orders would be redundant and wasteful and that it is not necessary to require approval one level above the contracting officer for a D&F for an IDIQ authorizing only T&M and LH contracts. Another commenter said separate D&Fs should be issued for each task order under an IDIQ contract when all task orders will be issued as T&M/LH. Another commenter said a D&F should be executed by the contracting officer only as currently required under the FAR, *i.e.*, a D&F should not be required for each order.

Response: The Councils note that there is no requirement for a D&F for each CLIN and that there is no requirement for a D&F for fixed price orders. The Councils acknowledge that the proposed rule contains additional requirements for commercial T&M/LH IDIQ D&Fs than those required for noncommercial T&M/LH IDIQ D&Fs. While the Councils recognize these additional requirements may be more burdensome, the Councils believe the additional requirements are needed to encourage the preference for the use of fixed price contracts for commercial items as required by the statute.

b. One commenter said the rule should make clear that a D&F will not be required prior to issuing a solicitation inviting both fixed price and T&M/LH proposals and that a D&F should only be required if the ultimate award is T&M or LH. Three commenters recommended setting a D&F threshold to limit the burden for small dollar acquisitions.

Response: FAR 12.207(b)(1) only requires a D&F before award. It does not require a D&F before issuance of a solicitation. The Councils also note that statute requires a D&F for T&M/LH contracts regardless of the dollar amount.

c. One commenter suggested adding a requirement for the D&F to address the specific reasons why a FFP contract was eliminated instead of allowing high-level generalities as explanations. The commenter also said the D&F should explain the boundaries of the requirement so the performance risk to the Government is reduced or the contract value or contract length is limited. Another commenter recommended changing the word suitable to a phrase more like ''a determination and findings (D&F) that the use of commercial items is not suitable if it is not used''.

Response: The content of a D&F is addressed in the rule at FAR 12.207(b). The rule requires that ''each D&F shall contain sufficient facts and rationale to justify that no other contract type authorized by this part is suitable.'' The Councils believe the rule provides adequate guidance to contracting officers as to the required content of the D&F. Sufficient facts and rationale include any necessary information regarding contract value and length. The D&F required by the statute and the rule relate to contract type only and not the determination of whether ''use of commercial items is not suitable.''

d. One commenter said the D&F process appears to be adequate and appropriate but the commenter recommended adding a requirement to analyze the need to definitively control the profit level when determining whether a fixed price contract is appropriate.

Response: The ''need to definitively control the profit level'' is not a criterion for determining whether a fixed price contract is suitable. T&M/LH contracts are only used ''when it is not possible at the time of placing the

contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.''

e. One commenter recommended adding a requirement to FAR 12.207(b)(1) for the contracting officer to obtain higher-level D&F approval before taking any actions to extend or renew the contract beyond five years because the Deputy Inspector General for Auditing has previously identified problems with service contracts such as T&M/LH contracts that have been extended or renewed for 10, 20, and even 30 years with no attempt to use available historical information to transform the T&M/LH contract to FFP.

Response: The Councils believe current FAR provisions adequately cover the commenter's recommendations. Actions to extend the contract or order beyond the limits established in FAR 17.204(e) require approval in accordance with agency procedures. In addition, FAR 7.103(r) requires that agency heads ensure that knowledge gained on prior acquisitions is used to further refine requirements and acquisition strategies. Furthermore, the rule requires that actions be taken to maximize the use of fixed price contracts, including limiting the contract length for T&M/LH contracts.

4. *Payment.*

a. One commenter asked the Councils to consider revising the last sentence of FAR 52.212–4, Alternate I (a)(i)(B) (sic, paragraph (i)(1)(i)(B)) from ''or other substantiation *specified in the contract*'' to ''or other substantiation *required by the contracting officer*'' because the commenter believes that the specific type of substantiation necessary may not be apparent until after award.

Response: The Councils do not believe it would be prudent to leave the contract terms open to the unilateral discretion of the contracting officer. The Councils believe it is imperative for commercial contractors to know what will be required to receive reimbursement. Leaving the contract terms open-ended will discourage competition and possibly lead to disputes. Should the parties agree after contract performance has begun that additional or alternative substantiation is needed, the contract can be appropriately modified.

b. One commenter said payment of partial hours should not be dependent on specific language allowing payment and recommended payment for work performed unless the contract specifically provides otherwise.

Response: The Councils agree that partial hours should be paid on a pro-rated basis and revised the rule to provide for payment of partial hours on a pro-rata basis.

c. One commenter said the Government's unilateral right to dispute a payment and withhold money under the Overpayments/Underpayments portion of the clause is inconsistent with commercial practices and that disputes should be subject to the Contracts Disputes procedures.

Response: The Councils believe that the rule is consistent with commercial practices since commercial companies withhold payments when the supplier does not comply with the terms of the contract. The Councils note that the Overpayments/Underpayments provisions protect both the Government and contractors and those contractors have full rights under the disputes clause of the contract to file claims and recover monies, including applicable interest.

d. One commenter said the payment clause on withholds for non-commercial T&M contracts at FAR clause 52.232–7 is not appropriate for commercial T&M contracts and the proposed payment provisions in paragraph (i) of the proposed alternate clause are acceptable.

Response: The Councils agree that withhold provisions at FAR clause 52.232–7 are not necessary for commercial T&M contracts and notes that the rule, like the ANPR, does not include the withhold provisions.

e. One commenter said it is common for a contractor to subcontract for labor categories when the contractor does not have the labor category identified in the contract and questioned what the contractor will be permitted to bill and what the Government will be required to pay the contractor for subcontract labor, *i.e.*, schedule rates or actual costs. The commenter also said clear guidance is needed on how to treat subcontract labor costs for both commercial and non-commercial T&M/LH contracts. Another commenter said the common commercial practice is to negotiate and pay vendors one hourly rate per labor category regardless of whether the work is performed by the prime or subcontractor employees, *i.e.*, ''blended rates'' which include subcontract rates.

Response: The Councils believe that the contract should clearly address how the contractor will be reimbursed for subcontract costs and revised the rule to provide for reimbursement of subcontractor costs at actual cost unless the contract specifies that the subcontract cost are reimbursable at the hourly rates prescribed in the schedule.

5. *Ceiling Price.*

a. One commenter said the not-to-exceed (NTE) requirements of the proposed rule and continued auditing of labor rates and internal costs by DCAA make long-standing fears about T&M contracts unrealistic.

Response: T&M contracts will continue to comprise the highest contract type risk to the Government since they provide the least incentive for contractors to perform efficiently and economically. The NTE ceiling for commercial T&M contracts, like the ceiling for non-commercial T&M contracts, simply limits the Government's risk. The Councils note that, like non-commercial T&M contracts, labor hours and not labor rates are subject to Government audit after contract award. The Councils further note that the Government's audit rights under the rule are limited to verification of labor hours and employee qualifications (when reimbursed on an actual cost basis), direct material, subcontract, and other direct costs.

b. One commenter said the ceiling prices may be established with the expectation of completion even if the contractor exceeds the ceiling price. Another commenter said the provision will encourage contractors to perform services on the Government's ''promise'' to extend ceiling prices thereby creating additional disputes and controversies. The same commenter also said that the Government should increase the ceiling price on a timely basis because the commenter believes the provisions that allow contractors to be paid after the fact for services provided prior to the obligation of money may violate the Anti-Deficiency Act (ADA).

Response: The provisions in the rule for commercial T&M contracts, like those for non-commercial T&M contracts, clearly state that the Government is not obligated to pay, and the contractor is not obligated to perform, after the ceiling price is reached. The Councils recognize that some contractors have continued to perform on noncommercial T&M contracts beyond the established ceiling based on a Government employee's belief that the ceiling price will be increased and agrees that this practice has led to many disputes and controversies. The Councils agree that the Government should increase the ceiling price on a timely basis when the Government intends to continue performance beyond the existing ceiling price and notes this is why contractors are required to notify the Government when they expect to exceed 85 percent of the ceiling price. The ADA prohibits the Government from taking any action to obligate the Government prior to obligating sufficient funds to the contract. The Councils further agree that

these provisions may result in a contractor being paid after the fact for services provided prior to the obligation of additional funds to increase the ceiling. However, since the Government has no obligation to pay for services rendered after the ceiling is reached and before additional monies are obligated, there is no ADA violation. After additional funds are obligated, the issue is allowability.

c. One commenter said requiring the contractor to track and report costs against a NTE value is inconsistent with commercial practices and that changes to its business systems to accommodate these government-unique requirements would not likely be justified since commercial customers do not need a ceiling price or notification of 85 percent of the NTE. The commenter said that the incentive to deliver high-quality support services at a reasonable price in the commercial marketplace is to retain a competitive advantage and maintain a reputation for responsive, high quality customer support. Another commenter said the provisions requiring notification to the Government when contractors believe they may exceed 85 percent of the ceiling price or that the total price to the Government will be substantially greater or less than the ceiling price in the contract makes the commercial provider responsible for Government management of the contract and requires systems and reports that are inconsistent with commercial practices. The commenter said this is a shift of responsibility and costs without justification and that commercial contractors are at risk since breach of this provision can result in non-payment for services rendered. Another commenter recommended not requiring ceiling prices when contracting under emergency procurement procedures.

Response: The Councils recognize there may be unique situations in the commercial marketplace where commercial companies agree to open ended commitments; however, statute prohibits the Government from doing so. As discussed in b above, the Government is prohibited from taking any action that obligates the Government prior to obligating sufficient funds to the contract. The same is true even for emergency procurements. The Councils note that these provisions also protect contractors from nonpayment for services rendered by ensuring sufficient funds are available if the contracting officer determines the ceiling price should be increased. Unless notified by the contractor, the Government will have no way of knowing when the contractor will exceed the ceiling since the Government does not know the price for work performed and not billed or the price of work planned to be performed in the current period. While systems and reports will vary between commercial providers, the Councils believe commercial providers generally track and measure performance against negotiated contract values and can therefore report projected expenditures and cumulative services rendered.

d. Another commenter said the ceiling price should equal the available funds since the total contract costs cannot be reasonably determined with any degree of confidence.

Response: The ceiling price is required by statute. While establishing a ceiling price is not an exact science, the ceiling represents the Government's best estimate of the contract price. If the estimated price increases during contract performance, the contracting officer will only obligate additional funds when it is in the Government's best interest to do so.

6. *Advance Consent for Overtime*. One commenter said the advance consent for payment of overtime is inconsistent with commercial practice and that commercial customers expect repair teams to work as necessary to complete repairs expeditiously. Another commenter believes that commercial standards should be utilized for overtime payment because requiring the contracting officer to approve overtime may delay the project and end up costing the Government more than results from contracting officer approval.

Response: The Councils believe the consent is needed to ensure overtime is only used when the Government agrees the additional costs of overtime are justified and necessary to meet the Government's objective. The clause provides the flexibility for the contracting officer to authorize overtime at the time of contract award if deemed necessary to meet essential delivery and performance schedules; make up for delays beyond the Contractor's control; or to eliminate extended production bottlenecks or project delays.

7. *Materials Costs*.

a. *Material Handling*. One commenter recommended using loaded rates or a fixed charge to allow contractors to recover material handling and subcontract administration costs without imposing the requirements of FAR Part 31. Another commenter said reimbursing contractors for material handling does not violate the cost plus a percentage of cost prohibition imposed by Congress because the material handling costs are not a ''fee'' of the type Congress prohibited. Another commenter said instead of using a percentage markup, which raises cost plus percentage of cost contracting concerns, the rule should permit the contractor to charge the Government a fixed fee for providing material that will compensate the contractor for its indirect costs. Another commenter said since the work is being awarded competitively, the rule should allow contractors to mark up their subcontractor's T&M or LH service rates as long as the amount of the mark-up is fully disclosed to the government and the total rate, including the mark-up, does not exceed the contractor's own rate for the same service thereby avoiding the application of Part 31 and concerns over cost-plus-percentage-of-cost contracting. Another commenter said material handling and subcontract administration costs are normally marked up a percentage rate as mutually agreed to and negotiated by the contractor and client. Two other commenters said customers are charged the catalog price that includes material handling charge. One commenter said basing material handling or subcontract administration fees on actual costs is rare in the commercial marketplace. Another commenter said that many commercial contractors do not add a separate material handling fee or subcontract administration costs on top of their fully burdened labor rates. Another commenter said payment of separate indirect rates for material and subcontracts should not be allowed for commercial purchases. Another commenter said contractors that are otherwise CAS covered will have to allocate the indirect cost for the direct materials on FAR Part 12 T&M contracts to those contracts even though the contractor will not be paid for the indirect costs and will suffer an overall loss. Another commenter concurred with the ANPR's proposed prohibition on mark-ups on materials costs.

Response: The comments reflect a varying set of commercial practices for material handling and subcontract administration costs. The Councils believe it is important to provide as much flexibility as possible without violating the cost plus percentage of cost prohibition. The Councils believe use of a fixed rate violates the cost plus percentage of cost contract prohibition. Therefore, the rule does not permit application of a fixed rate. The Councils believe use of a fixed amount may be appropriate and revised the rule accordingly. However, the fixed amounts for indirect costs should exclude any amounts already included in the schedule labor rates. Finally, the

Councils note that while the ANPR did not permit direct reimbursement for material handling, nothing in the ANPR or rule prevents contractors from including material handling in the fully burdened labor rates.

b. *Most Favored Customer Terms*. One commenter cautioned against use of the mandated ''most favorable customer'' terms for materials the contractor sells rather than purchasing from outside vendors. Another commenter said the ''most favored customer'' price clauses pose numerous compliance risks to industry and are inconsistent with commercial practices. The commenter said it cannot ensure that the catalog price for a part is no higher than the market price or the ''most favored customer'' price.

Response: The Councils note ''most favored customer'' pricing is consistent with the provisions for noncommercial T&M/LH contracts but not consistent with the general allowability provisions for material costs at FAR 31.205–26(f) and that the Councils are currently considering changes to the provisions for noncommercial T&M contracts. The Councils believe the provisions at FAR 31.205–27(e) are more appropriate for commercial contracts and revised the rule to permit reimbursement at the catalog or market price when the materials furnished by the contractor meet the definition of a commercial item at FAR 2.101. In addition, the Councils note that the ANPR failed to address interdivisional transfers. The Councils also revised the rule to specify the procedures for interdivisional transfers on commercial T&M/LH contracts consistent with the provisions of FAR 31.205–26(e).

c. *Most Advantageous Pricing*. One commenter said requiring ''most advantageous prices'' for purchases of material from outside vendors is inconsistent with commercial practices and the Government's own ''best value'' requirement. The commenter believes Government auditors will interpret ''most advantageous'' to mean lowest price when there are sound business reasons to procure from other than lowest price. The commenter said when prices are set by the initial competition, no further Government action should be taken. Further, the commenter said if the Government is concerned about product pricing, the Government should furnish the materials to the contractor so the Government, and not the contractor, will incur the unnecessary costs and risks associated with the proposed standards of most advantageous prices.

Response: The Councils believe the rule is consistent with commercial practices and the Government's ''best value'' determination because the rule, like commercial practice and the best value determinations, considers factors other than lowest price, *i.e.*, prompt delivery and quality materials. Since the rule specifically identifies factors other than lowest price, the Councils believe Government auditors will properly consider these other factors. In addition, the Councils agree additional Government action would not be needed if the material prices were set by the initial competition; however, the material price for commercial T&M contracts are not set at time of contract award. Instead, the Government reimburses contractors based on actual costs or catalog or market prices for the materials furnished by the contractors. Finally, the Councils do not believe contractors will incur additional costs or risks to buy materials at the most advantageous price because the Councils believe commercial companies already consider the price, quality, and availability before acquiring materials. The rule requires the contractor to obtain materials at the most advantageous prices ''to the extent able.''

d. *Refunds*. One commenter said requiring contractors to give the Government credit for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the contractor is inconsistent with commercial practices. The commenter also said commercial companies apply commercial pricing standards for its labor and spares catalog pricing for materials. Another commenter said the Government is arbitrarily establishing a method of pricing materials that is inconsistent with commercial practices and requires accounting of ''rebates, refunds and discounts that are received or accrued to the contractor.'' The commenter believes this tracking is unjustified, would be very costly, and ultimately result in many disputes that in turn would be costly for both Government and commercial services contractors for audits, disputes and legal fees. The commenter recommended that the Government rely on competition as means to determine the price is fair and reasonable. Another commenter said that if a contracting officer is responsible for enforcing this requirement of giving the Government credit for all discounts and rebates, it may be advisable to consider allowing the CO to require supporting information from the contractor. Another commenter recommends that these contracts include refund or price reduction clauses allowing the Government to recoup any overages identified through surveillance of the contract.

Response: The Councils recognize that reducing the price of materials for any possible applicable credits may not be customary in the commercial marketplace. The Councils note that the credits only apply when the Government reimburses the contractor at his actual costs, which, if such credits are received, are reduced accordingly. However, to be more consistent with commercial practices, the Councils revised the rule to limit the requirements to credits received by or accrued to the contractor.

e. *General*. One commenter said limiting the ''allowable material costs'' to actual costs focused on ''costs'' rather than ''price'' which is fundamentally inconsistent with commercial practices.

Response: While reimbursement for actual costs may be inconsistent with commercial practices, the Councils believe payment of the actual cost is necessary to protect the Government when the material being sold to the Government does not meet the definition of a commercial item at FAR 2.101. The Councils note when the material is a commercial item, the rule provides that the contractor will be paid on the basis of an established catalog or market price.

8. *Consent to Subcontract*.

a. Several commenters said the consent to subcontract requirements should not apply to commercial contracts because they are inconsistent with commercial practice. One commenter said that the consent to subcontract requirement is generally limited and does not apply when a prime contractor requires subcontracting to an affiliate. Two commenters said the consent to subcontract is necessary and agreed with the proposed language in paragraph (u) of Alternate I at FAR clause 52.212–4. Another commenter said the normal practice is that the contractor is not allowed to assign any portion of its responsibilities or rights under the contract without first obtaining the written approval of the client. Two commenters said the subcontract consent requirement is contrary to the FASA's intended purpose of simplifying commercial item contracting. Another commenter said the requirement will add administrative effort and costs with no value added to contractors and little benefit to the Government. Another commenter said that once an authorized determination has been made to allow a T&M contract type, further authorizations for T&M should not be required for subcontracts

under an approved overall contract. The commenter said it should be presumed that the approval of T&M for the prime contract flows to all subcontracts under it. Another commenter said since commercial contractors are not likely to have government-approved purchasing systems, the contractors would be subject to the proposed subcontract consent provisions which is not practicable in commercial contracts and is not a commercial practice. Another commenter said the costs outweigh benefits when the choice is to either create/maintain approved purchasing system or delay performance pending Government approval. The same commenter also said a fair & reasonable determination can be made at contract award because use of T&M is limited to contracts awarded through competition.

Response: When contractors add or substitute subcontractors after award, the basis for the best value determination used to award the contract may have been altered. Therefore, the Government must have the right to approve changes in subcontractors to maintain best value. As indicated by some of the comments, some commercial companies reserve the right to approve or deny changes in subcontractors. In fact, one commenter stated ''the normal practice is that the contractor is not allowed to assign any portion of its responsibilities or rights under the contract without first obtaining the written approval of the client.'' The Councils do not believe subcontract consent will add significant administrative effort but will protect the Government from potential subcontractor substitution issues.

b. One commenter recommended revising the proposed paragraph at FAR 12.216 as follows because all contractors should be required to get the contracting officer's consent prior to using foreign subcontractors to prevent contractors from negotiating labor hours and rates based upon its local workforce and subsequently subcontracting with a foreign contractor with much lower rates.

(1) Add the following after the second sentence in proposed FAR 12.216:

Any subcontract with a foreign company when the work will be physically performed outside the United States or Canada requires the contracting officer's consent.

(2) Add the following phrase at the end of the proposed last sentence:

. . . except for subcontracts with a foreign companies as described above.

(3) Add the following new coverage to the proposed FAR clause at 52.212–4, Alternate I (u), to enact the revised requirements discussed above:

(2) The Contractor must obtain the contracting officer's written consent for any subcontract with a foreign company when the work will be performed outside the United States or Canada.

Response: Such provisions are not provided for non-commercial T&M contracts. The Councils do not believe it is advisable to add more stringent requirements for commercial T&M contracts than are used for non-commercial T&M contracts. The Councils are not aware of any problems in this area under existing T&M contracts.

c. One commenter said the rule should (as the ANPR proposes) require contractors to obtain the contracting officer's consent to subcontract. The Government should know what entity is providing services on a T&M or LH basis. However, the requirement to obtain consent to subcontract should apply only to charges that are directly charged to the contract, as opposed to overhead expenses and general and administrative expenses. Many commercial companies have corporate-wide agreements with vendors to perform those functions.

Response: The Councils agree that the consent to subcontract applies only to costs that are directly charged to the contract and does not apply to overhead expenses and G&A expenses. The provisions in the proposed rule are the same as the consent to subcontract requirements for non-commercial T&M contracts. Therefore, there is no need to provide additional language.

d. One commenter assumed that the clause at FAR 52.212–4, Alt. I, paragraph (u) can be tailored to conform to commercial practices in the industry as provided under FAR 12.302(b) and recommends acknowledging such in the final rule.

Response: The tailoring provisions at FAR 12.302 do not apply to the proposed FAR clause at 52.212–4, Alternate I, paragraph (u), because the Councils believe tailored subcontract provisions may not adequately protect the Government's interests. While some commercial companies may allow assignment of rights and responsibilities under the contract without the approval of the client, the Councils do not believe commercial industries, as a whole, generally allow unknown or unapproved changes to the contract. The Councils believe the Government should retain the right to approve such changes to protect the Government's interest in achieving best value. The Councils revised FAR 12.301(b)(3) to clarify that the Alternate clause is not subject to the tailoring authorities of FAR 12.302.

9. *Contractor Purchasing System Reviews (CPSR).* One commenter said imposing CPSRs requirements on commercial T&M or LH contracts would stop many small businesses and small disadvantaged businesses from providing commercial services since these businesses may not need, nor have, the sophisticated infrastructure required to successfully complete a CPSR.

Response: The rule does not impose a CPSR requirement but simply recognizes that contractors with approved purchasing systems require less oversight because the contractor's overall system provides adequate controls and procedures to protect the Government.

10. *Other Direct Costs (ODC).* One commenter said ODC may include travel, software license fees, software subscription fees, and other categories of other direct costs outside the normal definition of materials and subcontracts. The commenter suggested not defining the elements of ODC so that these other types of other direct costs could be proposed and evaluated. Another commenter asked whether travel would be considered ''materials'' under a T&M contract or be perceived as a cost reimbursement item requiring non-commercial procedures. Another commenter noted that the ANPR appears to only allow materials costs and subcontract costs to be charged as ODC. The commenter suggested limiting the definition of materials costs to preclude direct charging of intangible types of costs and force vendors to include such costs in their loaded labor rates.

Response: The Councils believe that it is important to provide as much flexibility as possible. However, it is also imperative that the contract clearly articulates what costs are reimbursable outside of the fixed hourly labor rate(s) set forth in the contract. To clarify the issue, the Councils revised the rule to allow reimbursement of ODC based on actual costs for the types of ODC specified in the contract thereby allowing flexibility to negotiate reimbursable ODC on a case-by-case basis.

11. *Government Property.*

One commenter said customers do not normally furnish property for commercial T&M or LH airplane repair contracts. Another commenter said customer provided property is not the ''norm'', but if property is supplied, the owner's standard procedures should apply. Another commenter said GFP should be listed in the contract and tracked by the agency's property management process. Another commenter said the proposed Alternate I to the FAR clause at 52.212–4 should

also contain a provision requiring any property or equipment submitted for reimbursement under the contract as ODC to be designated as Government property and treated accordingly. Another commenter said this does not occur often on professional A&E services contracts. When it does, it normally is in the form of Project Record Documents for existing facilities that the customer wishes to remodel or modify. Such Project Record Documents are managed and controlled by our staff as if they were our own. Upon completion of the contract, such documents are returned to the customer in their original condition. They can be either in hard copy or electronic medium.

Response: As with any acquisition, the need to furnish Government property will depend on the nature of the requirements, e.g. military equipment repair. However, when property is furnished, the contract must include the appropriate Part 45 property clauses. The Councils note that the Councils are revising Part 45 and the associated clauses to reflect accepted industry practices for property management. Finally, the Councils note documents, such as project record documents, are not considered Government property under FAR Part 45.

12. *Government Oversight*.

a. One commenter recommended that the Government hold the prime contractor accountable for proper record keeping and invoicing and not require copies of a commercial subcontracting agreement and subcontractor invoices because the Government has no privity with the subcontractors. The commenter believes requesting such information is clearly inappropriate and that the Government has no need to routinely obtain and review subcontractor's documentation since the Government presumably evaluated and accepted the prime's proposal. Another commenter asserted that subcontract costs should be the responsibility of the prime for competitive procurements and there should be no Government involvement.

Response: The Councils agree that the Government generally will not need access to the subcontractor's books and records. The Councils believe there are two possible scenarios regarding subcontract costs. The first scenario is where the contract provides for subcontract costs to be reimbursed at actual costs to the prime contractor. In this case, the Government would need to verify that the prime contractor has actually made the payments in the ordinary course of business and that such payments were made in accordance with the subcontract agreement (the Government would not need access to the subcontractor books and records, only to a copy of the subcontract agreement maintained by the prime contractor and verification to the prime contractors records that payment was made). The second is where the contract provides for the subcontract costs to be reimbursed at the prime contract fixed hourly labor rates. In this case, the Government needs to have some assurance that the prime contractor has verified the hours worked by the subcontractor. To address this situation, the Councils have revised the rule to require that subcontractor hours be substantiated by actual payment, individual timecards, employee qualifications, or other substantiation specified in the contract.

b. One commenter said the proposed Alternate I to FAR clause 52.212–4 creates issues related to the governments audit rights such as whether the government has the right to interview contractor employees about work they have performed. Another commenter said access to contractor employees is not consistent with commercial practices and should not be permitted.

Response: The rule permits, but does not require, contracting officers to have access to contractor employees. While such access may not be a standard commercial practice, the Councils believe employee interviews may be necessary in some cases to verify the hours claimed by the contractor.

c. One commenter advocates including protections, above those currently required in commercial items purchases, for commercial services bought on a T&M/LH basis. The commenter suggested a provision which would authorize the CO to request substantiation for hourly rates charged under the task orders stating that such a provision would allow for substantiation of hours worked, access to original timecards, timekeeping procedures, labor distribution reports, and assigned employees. The commenter also said documents such as employees' resumes or other personnel records of employees, to verify that employees have the contractually required qualifications and experience, should be made available for Government review. The commenter also suggested identifying labor distribution reports as ''records of distribution of labor'' to avoid confusion at contractors that do not maintain formal reports, but do maintain records relating to their distribution of labor.

Response: The Councils believe that access to employee timecards, labor distributions, and the ability to interview the employees should provide sufficient information to verify the validity of hours claimed on the contract. However, the Councils believe that there may also be a need to assess employee qualifications to verify that the employee meets the qualifications of the labor category to which he/she has been charged. Therefore, the Councils revised the rule to also provide access to records that substantiate employee qualifications. In addition, the Councils revised the rule to say ''records of distribution of labor'' versus ''labor distribution reports'' to be more consistent with commercial practices.

d. One commenter said that additional controls and oversights are used in the commercial marketplace since T&M/LH contracts do represent more risk to the buyer, e.g., verification of labor hours performed versus billed, labor categories utilized versus billed, and adequate accounting systems so the buyer could validate costs billed. The commenter also said that existing oversight methods and controls for Federal non-commercial T&M/LH contracts are a good basis for crafting the methods and controls to apply to Part 12 T&M/LH contracts and that the proposed rule appears to have carefully examined those terms and conditions that should be applied to the new authority under FAR Part 12. Another commenter said that allowing contracting officers to negotiate access to other types of documents on task orders, where circumstances merit such access, is warranted. Another commenter said that access to commercial contractor records or audit rights is uncommon, limited in scope or nonexistent and that surveillance, if any, was generally limited to verification of hours or expenses billed. Another commenter said in the commercial marketplace, the contractor is responsible for providing sufficient information to support billings for hours charged, materials used, and subcontracts performed.

Response: The Councils believe that the ANPR carefully considered existing requirements for T&M contracts as well as differences between the commercial marketplace and non-commercial contracts. The Councils believe the rule provides the proper balance between the need to verify compliance with contract terms and the need to minimize access contractor records.

e. Two commenters said the payment provision in the FAR clause at 52.212–4 and the proposed alternate provisions are inconsistent with commercial practices. One of the commenters also said commercial companies do not

provide access to time cards, actual material or subcontract costs, employees or employee time cards and that this access would not be provided to the Government and that oversight is not used to ensure work is being properly charged. Another commenter said it is a customary commercial practice for the seller to grant limited access to records and limited audit rights, *i.e.*, time sheets, invoices, expense reimbursement receipts, etc. This commenter and another commenter said the Government should not have access to contractor employees. Another commenter said it is normal practice for the client to request copies of time cards, along with detailed invoices outlining which individual performed the services, the amount of time that individual spent on those services during the period of the invoice. In addition, the time card would have the respective supervisor approval indicating that the time was properly recorded. The clients also normally require that they have the ability to audit the contractor's records if they so choose.

Response: The Councils believe the Government must have some assurance that the number of hours claimed by the contractor accurately reflects the time spent by the appropriate labor category performing work on the contract and that the amounts paid to the contractor based on actual costs accurately reflect the actual costs paid by the contractor for materials, subcontracts, and other direct costs. Some commenters said their commercial companies do require access to time cards, actual material, and subcontract costs as a condition for T&M contracting. The Councils believe that the rule minimizes access to records to only those documents that are necessary to verify compliance with the contract terms. The Councils do not believe it is appropriate for the Government to simply accept the submitted hours and material/subcontract costs as valid without some type of verification.

f. One commenter noted that the ANPR failed to include sufficient oversight mechanisms to protect the taxpayers' interests. The commenter recommended establishing periodic audits and reporting requirements on the use of D&F in commercial T&M/LH contracts, and requiring approval of the D&F by the head of the contracting authority. Further, the commenter recommended that the Government have access to the contractor books and records; FAR clause 52.215–2, Audit and Records—Negotiation, should be included in all T&M/LH contracts; and contracts should be subject to the cost principles found in FAR Part 31, Contract Cost Principles and Procedures. Another commenter is not opposed to T&M and LH contracts, but opposes the proposed rule because it does not make them subject to full oversight and audit provisions.

Response: The FAR does not provide for periodic audits of contracting officer decisions. The frequency and scope of such audits are under the purview of the agency Inspector General, not the FAR Council. In regards to the application of FAR Part 31, the Councils do not believe such access is necessary because the proposed rule does not provide for reimbursement of indirect costs using actual indirect cost rates. In addition, the rule does provide access to those records necessary to verify those costs that are reimbursed on an actual basis. There is no benefit to extending such access to include all records that are normally accessible for non-commercial contracts. In fact, extending such access would essentially nullify the concept of a commercial contract.

g. One commenter believes substantiation of invoices should be based on commercial practices, rather than relying upon a time card system, ''as presumably identified'' in the DCAA manual. This commenter also believes this is inconsistent with commercial practices regarding audits of cost by requiring timecards pursuant to Government procedures and that SARA does not authorize this extension of Government rights to provide auditors with ''free range with disrupting employees and subcontractor relationships.'' Another commenter asserts that the ''Proposed rule does not include any of the protections that are in the commercial market.'' This commenter believes these ''contract vehicles are high risk and do not include adequate cost controls.''

Response: While these commenters refer to using commercial practices for protection (*e.g.*, for substantiation of invoices), neither commenter provides a description of what that protection is, *i.e.*, how does the commercial customer know the hours or actual costs are a proper reflection of the amounts actually incurred? The Councils believe there must be some verification, and believes that the proposed rule provides the minimum access to records needed to perform that verification. The Councils do not believe that SARA requires the Government to make payments based on actual hours and/or actual costs incurred without some form of verification. The Councils note some commenters said requiring access to time cards, invoices, and subcontract agreements is a standard commercial practice for T&M contracting.

h. One commenter believes that quality assurance is not sufficient to protect taxpayers and that post award audits are necessary. The commenter also expressed concern that currently paragraph (e) of FAR clause 52.232–7 allows for contracting officer requests for audit prior to final payment and that this may contradict other provisions for commercial audits that are not subject to post award audits. Additionally, the commenter said there may be a conflict between 41 U.S.C. 254d(a)(1) and 10 U.S.C. 2313(a) (which allows post award audits) and the FAR provision (which does not expressly allow audits for commercial items). The commenter believes that if a post award audit provision is not included, the contracting officer should be required to provide written justification why one was not included. Further, the commenter said the audit should occur when the contractor notifies the Government that the costs will exceed 85 percent of ceiling. The commenter recommended a price reduction clause to recoup overages identified in audit.

Response: Post-award audits for commercial items are necessary for T&M contracts. The contract clause requires the contractor to substantiate the labor hours and material, subcontract, and other direct costs. The rule provides the necessary access to records to verify compliance with these contract terms.

i. One commenter said the ANPR's suggestion of describing the types of information that may be audited to verify material and subcontract costs (rather than merely repeating the vague ''substantiating material'' description) makes sense. The commenter also said government access to the contractor's employees to verify hours charged is unnecessary, inconsistent with commercial practices, and substantially broader than the Government's rights under the existing T&M payment clause. In the absence of indicia of fraud or other wrongdoing, timecards should be sufficient evidence of hours actually worked. Given the time and expense associated with conducting interviews, the government would likely interview employees only when there was a basis to investigate alleged wrongdoing. In those circumstances, the government could obtain information through subpoenas; a contract clause is therefore unnecessary.

Response: According to some commenters, requiring access to contractor employees is a standard commercial practice for T&M contracting. In addition, the proposed provisions for access to contractor

employees are no broader than what is currently provided for under non-commercial T&M contracts. The relevant access to records provision for current T&M contracts is not the T&M payment clause, but instead is the clause at FAR 52.215–2, Audit and Records—Negotiation, which provides the Government with access to contractor employees. The Government should not have to allege wrongdoing to interview contractor employees when their labor hours are included on invoices submitted to the Government.

j. Commenters at the public meeting said commercial companies do not keep payment records three years after contract completion.

Response: The requirement at paragraph (d)(2) of FAR clause 52.212–5 for contractors to maintain the payment records three years after contract completion is a statutory requirement that provides for Comptroller General examination of records under contracts for commercial items.

13. *Nonconforming.*

a. One commenter said it may be extremely difficult for the Government to enforce the defects language after the contractor invoices and the Government accepts the labor, as opposed to accepting the tangible products generated by the labor, because the Government will have a difficult time proving, after the fact, that the labor was defective or otherwise unacceptable unless the Government can prove fraudulent timekeeping practices or sloth on the part of the contractor or its employees can be proven. The commenter also said if the contractor provides the correct mix of labor skills and the service is provided in accordance with the statement of work, the contractor should bear no burden for corrections and that it would be hard to reject or prove the services were non-conforming after payment since the Government evaluates, interviews, and approves contractor personnel. Another commenter said it is reasonable to expect the contractor to be responsible for the correction of any non-conforming contract requirement, if it is determined to be the fault of the contractor.

Response: The Councils agree that it may be difficult to prove services are nonconforming on a commercial T&M/LH contract after the contractor has invoiced the Government and the Government has accepted and paid for the labor. The Councils note the current FAR coverage, while previously applicable only to commercial FFP contracts, provides post acceptance remedies for nonconforming services. The rule simply adds additional remedies to address situations when reperformance will not correct the defect or is not possible to reperform.

b. One commenter recommended replacing the word ''may'' with ''should'' in the third and sixth lines of paragraph (a) at FAR clause 52.212–4 because Government officials should be encouraged to seek consideration for nonconforming services and should be required to ensure that the contractor's future performance conforms to the contract requirements. The commenter also recommended revising proposed paragraph 52.212–4, Alternate I (a), to include the word ''should'' instead of ''may'' in the seventh, twelfth, and fifteenth lines for the same reasons.

Response: The use of the term ''may'' is consistent with the existing terminology for commercial FFP contracts, *i.e.*, paragraph (a) at FAR clause 52.212–4, which states the ''Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price.'' The Government should seek consideration when appropriate. However, the Councils believe the term ''may'' provides the contracting officer sufficient latitude to exercise their judgment while managing the contract. The Councils did, however, revise the rule to clarify that the Government may seek either ''an equitable price adjustment or adequate'' consideration and deleted the language that allowed the Government to require the contractor to ensure future performance conforms to contract requirements because the Councils believe that this language is unnecessary since the Government already has this right through the use of a cure notice.

c. One commenter said commercial T&M agreements include a warranty and a disclaimer of any other remedies as permitted under the UCC. Another commenter said seeking consideration for acceptance of nonconforming supplies or services is a right of the Government under common law so there is no need to include such a provision in the clause.

Response: Remedies, including warranty provisions, vary by industry, service and products. The FAR routinely includes rights covered under common law in contract clauses to ensure all parties are cognizant of their rights and responsibilities.

d. One commenter said the requirement for contractors to repair or replace rejected supplies or reperform rejected services at no cost to the Government imposes more contract risk on the contractor than the non-commercial clause which does not require repair or reperformance at no cost to the Government, essentially imposing a fixed-price level of risks. The commenter further said combining a ceiling price that contractors exceed at their own risk and a requirement that the contractor use ''best efforts'' to perform within the ceiling price may result in contractors interpreting the clause to requirement to mean accomplish a certain result, *i.e.*, ''performance of the work specified in the Schedule'' within a specified dollar amount, *i.e.*, the ceiling price. The commenter recommended allowing contracting officers, where appropriate, to compensate contractors for reperformance or repair of deficient services or supplies up to the ceiling price, but not including profit, to be consistent with the non-commercial clause and to more accurately reflect standard commercial practices. Two commenters also recommended that replacement of nonconforming supplies or re-performance should be at no increase in contract price, allowing the contractor to re-perform up to the agreed upon ceiling price. Another commenter said the proposed rule establishes a contractor-friendly threshold because the contractor is agreeing to use its best efforts to perform work and T&M contracts pay for time or money spent, not milestones reached or work completed. Commenter states this is main difference between commercial practices and proposed rule.

Response: The Councils agree that contractors are generally only required to use ''best efforts'' to accomplish the desired results within the established ceiling price on both commercial and non-commercial T&M contracts as opposed to FFP contracts which requires contractors to accomplish stated results within the fixed price. The non-commercial T&M/LH clause does allow contractor to be paid for reperformance, without profit, up to the ceiling price (or the ceiling price as increased by the Government) unless the contractor fails to proceed with reasonable promptness to reperform within the ceiling price (or the ceiling price as increased by the Government), in which case, the Government may charge the contractor reperformance costs or terminate the contract for default. Additionally, the noncommercial clause only allows the Government to require the contractor to remedy without reimbursement in very limited situations such as fraud and willful misconduct. Since contractors are only required to use ''best efforts'' within the established ceiling price for

T&M and LH contracts, the Councils agree contractors should be paid for reperformance, without profit, up to the ceiling price. The Councils revised the proposed rule to be consistent with the provisions for noncommercial T&M contracts at FAR clause 52.246–6. However, since contracting officers will not necessarily know the proposed profit in competitive awards, the Councils revised the noncommercial T&M provisions to require contracting officers to specify a profit decrement in paragraph (a)(4) of the clause. Unless otherwise specified by the contracting officer, the labor rates will be reduced by 10 percent to exclude profit.

e. Another commenter said that its commercial contracts include normal commercial warranties that cover workmanship and materials. Under these provisions, a buyer can make a warranty claim and, if deemed valid, the servicing company would re-perform the work at no charge. Another commenter said surveillance/QC/Inspections for T&M and LH commercial contracts versus those of commercial FP contracts do not vary. Contractors are responsible for performance to minimum stated levels of completion and quality. Reviews of performance by the customer are the same regardless of the type of contract executed.

Response: When the commercial warranties adequately cover workmanship and materials, there is generally no need to include additional requirements addressing non-conforming supplies or services. In other instances, commercial warranties may not exist or may not adequately address the contract requirements. In such cases, the Government needs provisions to address non-conforming supplies and services. As such, the rule provides remedies for non-conforming supplies and services that are consistent with those provided for under non-commercial contracts.

14. *Termination*.

a. One commenter recommended revising FAR 12.403 to specify the amounts recoverable upon termination for convenience of a T&M or LH contract for commercial services because the ANPR did not adequately address a contractor's need to recover material costs in a termination for convenience.

Response: As provided in FAR 12.403(d)(ii), which also applies to commercial FFP contracts, contractors can recover ''any charges the contractor can demonstrate directly resulted from the termination.'' While material costs are not specifically addressed in this coverage, a contractor would recover the costs if the contractor is able to demonstrate the costs were incurred in support of the contract and the costs are otherwise allowable in accordance with the proposed language at paragraph (i)(1)(ii) of FAR clause 52.212–7.

b. One commenter said the concept of termination for convenience is inconsistent with commercial practices and would be considered a breach of contract, with damages, in the commercial marketplace. The commenter also said amount of damages would be negotiated or established in a lawsuit and would not be limited to reasonable charges the contractor can demonstrate to the satisfaction of the Government using its standard record keeping system. Another commenter said few, if any, commercial T&M contracts include right of immediate termination as is proposed. Further, the commenter said the Government should compensate for additional costs beyond hours worked as is provided for in FAR 12.403(d)(ii) and that the termination clause should mirror those used in the commercial marketplace which generally require 30 to 90 days termination notice with no cap on compensation.''

Response: The Councils recognize that terminations for convenience are not standard commercial practice. However, to protect the public's interest, the Government must retain the right to terminate a contract when the product or service is no longer needed or funds are not available. The Councils note the FAR already contains the provisions for terminating commercial contracts at the Government's convenience. The proposed rule simply provides the basis for calculating labor costs on a terminated commercial T&M/LH contract.

15. *CAS Applicability*.

a. One commenter said CAS coverage needs to be extended to commercial contracts when the contractor is already CAS covered. Another commenter said many commercial companies do not require employees to record all time worked and that these companies' labor charging systems will not be tied to a CAS compliant accounting system. The commenter said requiring commercial companies to comply with CAS flies in the face of commercial item reform. Another commenter stated that CAS should continue to apply to all T&M/LH contracts to protect taxpayers' interests by ensuring consistent accounting treatment, proper allocation of costs to contracts, and preparation of reliable cost estimates. Another commenter said application of CAS is unnecessary and would have adverse consequences. This commenter noted that commercial contractors that sell exclusively in the commercial marketplace most likely do not have accounting systems configured to comply with CAS and may decline to perform commercial services for the government on a T&M or LH basis. Accordingly, CAS rules should be amended to exempt commercial services purchased under T&M or LH contracts from its coverage. Another commenter said they see no particular difference between the contract types as to the applicability of CAS. Another commenter said commercial systems are set up to support commercial transactions, not to comply with CAS clauses in Government contracts. Thus, this commenter asserted, such clauses would not be acceptable. One commenter stated CAS should not apply to commercial item acquisitions and that the CAS Board did not fully implement FARA since FARA exempted all contract for commercial items from CAS requirements. Another commenter said that if CAS applies to commercial T&M/LH contracts, the government will effectively eliminate most commercial contractors from competition for these types of contracts. Another commenter said that CAS should not apply and all that should be required from contractors is an adequate accounting system for recording hours and material purchases.

Response: Revisions to CAS requirements is beyond the scope of this case. The Councils will forward the comments to the CAS Board for the Board's consideration.

b. One commenter said that the ''Councils'' infer that they (the Councils) have some authority to amend or interpret CAS, as evidenced by the Councils soliciting public comments based on the assumption that CAS will not apply to commercial T&M/LH contracts.

Response: The **Federal Register** notice is very clear that any actions regarding the Cost Accounting Standards would need to be taken by the CAS Board. In paragraph (3) of Section C, Regulatory Amendments under Consideration, the Notice states the following:

> The need for potential amendments to the current CAS exemption for commercial items is being considered. Temporary waivers are subject to approval by the CAS Board. Permanent exemptions are subject to the regulatory promulgation process and are codified in 48 CFR Chapter 99. No changes to FAR 12.214 are reflected in the draft amendment that is being published with this notice. However, FAR 12.214 will be revised to reflect any actions that are taken by the CAS Board. Any public comments addressing CAS will be provided to the CAS Board for consideration.

16. *General Comments*.

a. One commenter said the Councils were too restrictive when they implemented Section 8002(d) of FASA (Pub. L. 103–355) because there is no statutory prohibition against the use of T&M/LH contracts. The commenter requested the Councils to take this opportunity to revisit this question and amend the FAR to permit use of T&M/LH contracts to acquire any commercial item.

Response: Congress was well aware of the FAR requirements that limit the available contract types for commercial items when it drafted Section 1432 of the National Defense Authorization Act for Fiscal Year 2004. If Congress disagreed with the Council implementation of FASA, the Councils believe Congress would have expanded Section 1432 to specifically authorize T&M/LH contracts for commercial items. The Councils do not believe it is appropriate to expand contract types for commercial items without specific statutory authority.

b. One commenter questioned why the minutes posted by the Councils from the Public Meeting did not include the detailed questions and answers discussed at the Public Meeting. Specifically, the commenter was concerned that the minutes failed to recognize the discussion on how to conduct market research to determine if the service was sold in the commercial marketplace using T&M or LH contracts.

Response: The purpose of the public meeting was to allow the public to provide input on the effective use of T&M and LH contracts for the acquisition of commercial items and suggestions for implementing the provisions of the SARA legislation for the Council's consideration. While the Councils did record and post the general topics that were discussed at the meeting, the Councils did not record or post the detailed discussions from the meeting. The ANPR and the proposed rule contain provisions that require the contracting officer to consider various customary practices, including contract type, when conducting market research. Detailed instructions for how to conduct market research are not contained in the FAR because the instructions would vary based on the unique aspects of the acquisition. More specific instructions are appropriately contained in agency training materials.

c. One commenter said that the proposed rulemaking should be designated as a major rule under the Congressional Review Act and economically significant under Executive Order 12866. The commenter also states that the assessment of benefits, costs and reasonable alternatives should be conducted assuming applicability and inapplicability of Cost Accounting Standards (CAS) and reviewed by Agency attorneys, economists, engineers and scientists.

Response: As required in the regulatory process, OMB's Office of Information Regulatory Affairs reviewed the rule to ensure the requirements of Executive Order 12866 were fully met.

d. One commenter noted that the ANPR failed to eliminate what the commenter considers the current illegal use of commercial T&M/LH contracts by GSA by declaring commercial T&M/LH contracts executed in violation of FAR 12.207 null and void.

Response: The rule implements Section 1432 of Public Law 108–136. Questions over legality of actions agencies may have taken prior to this authority are beyond the scope and authority of the Councils.

e. One commenter said the FAR Council has exceeded its statutory authority under SARA by adding clauses and requirements that are not consistent with the requirements of Section 8002 of Public Law 103–355 which limit the contract clauses, to the maximum extent practicable, to those required to implement provisions of law or executive orders or those determined to be consistent with standard commercial practice.

Response: The Councils believe it limited the contract clauses to the ''maximum extent practicable'' to those required to implement the SARA legislation for commercial T&M and LH contracts. The Councils acknowledge it added a limited number of provisions not specifically mandated by the SARA legislation (such as consent to subcontract); however, the Councils believe that the provisions are needed to protect the Government and are, to the maximum extent practicable, consistent with commercial practice. FASA acknowledges that additional contract clauses may be required by including the phrase ''to the maximum extent practicable.''

f. One commenter identified industry best practices of close communication and cooperation between buyer and seller, using a project management team that is well versed in the types of services involved, and establishing Forward Pricing Rate Agreements with firms frequently contracted with for T&M/LH to reduce the time and effort involved in contract formation and administration.

Response: The Councils thank the commenter for the identified best practices. The Councils agree close communication, cooperation, and knowledge of the type of services are necessary for any successful procurement. The Councils note, however, that commercial T&M and LH contracts will be awarded using competitive procedures and establishing forward pricing rate agreements is not necessary and contrary to competitive procedures.

g. One commenter requested that the Councils consider customary commercial pricing concepts for acquiring commercial services to be consistent with the tenets of FAR Part 12 and existing statutes. FAR Part 12 encourages the consideration of commercial practices when acquiring commercial services. As an example, the commenter identified GSA's recent multi-channel contact center contract, which involved acquiring commercial telecommunication services on a price per unit or price per minute basis.

Response: The rule does not prohibit the use of a wide variety of commercial pricing practices including the example given by the commenter.

h. Two commenters recommended that the final rule explicitly state that the rule only applies to contracts executed on or after the effective date of the rule. In addition, one of the commenters said the rule should not apply to task orders under IDIQ commercial contracts in existence at the time of the rule's effective date unless mutually agreed to in writing by all parties.

Response: The standard FAR conventions at FAR 1.108(d) apply. As the rule does not specify otherwise, the FAR changes apply to solicitations issued after the effective date of the change. However, the Councils note the FAR allows contracting officers to make changes in existing contracts with appropriate considerations and mutual consent of the parties.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because small entities that have not bid on non-commercial T&M/LH contracts in the past may be induced to bid on commercial T&M/LH contracts. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

Initial Regulatory Flexibility Analysis

1. Description of the reasons why action by the agency is being considered. This proposed rule would revise the Federal Acquisition Regulation to allow contracting officers to award Time and Material and Labor Hour (T&M/LH) contracts when procuring commercial items. The proposed rule is required by Section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136).

2. Succinct statement of the objectives of, and legal basis for, the proposed rule. This proposed rule implements Section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136), which authorized the use of Time and Material or Labor Hour (T&M or LH) contracts for commercial services acquired in support of a commercial item, and any other category of services that is designated by the Administrator of OFPP as being of a type commonly sold to the general public on a T&M or LH basis, and would be in the best interest of the Government to acquire such services on a T&M or LH basis.

3. Description of, and, where feasible, estimate of the number of small entities to which the proposed rule will apply. The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the use of commercial practices will allow additional small businesses that do not maintain records that are adequate for cost reimbursement contracting to compete for commercial T&M/LH contracts. At this time, there is no way to predict the number of procurements that will be awarded using commercial T&M/LH contracts, nor is there a method available to estimate the number of small entities that may be influenced by this change to begin competing for these types of contracts.

4. **Description of projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.** The rule would require contractors to maintain records to support invoices presented to the Government for payment. Such records would include original timecards, the contractor's timekeeping procedures, distribution of labor, invoices for material, and so forth. These are standard records maintained by any company, large or small, and the fact that the contract would require that these records be made available to the Government should not place any additional record keeping burden on the entity.

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule. There are no Federal rules that duplicate, overlap or conflict with the proposed rule.

6. Description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. There are not any alternatives to publishing this proposed rule that will accomplish the stated objectives of Section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). The rule includes only FAR text revisions required to implement the statute cited herein.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR parts 2, 10, 12, 16, 44, and 52, in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2003–027), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 10, 12, 16, 44, and 52

Government procurement.

Dated: September 16, 2005.

Julia B. Wise,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 10, 12, 16, 44, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 10, 12, 16, 44, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

2. Amend section 2.101 in paragraph (b), in the definition ''Commercial item'', by removing the second sentence in the introductory text of paragraph (6).

PART 10—MARKET RESEARCH

10.001 [Amended]

3. Amend section 10.001 by removing from paragraph (a)(3)(iv) ''as terms'' and adding ''as type of contract, terms'' in its place.

4. Amend section 10.002 by revising paragraph (b)(1)(iii) to read as follows:

10.002 Procedures.

* * * * *

(b)* * *

(1)* * *

(iii) Customary practices, including warranty, buyer financing, discounts, contract type considering the nature and risk associated with the requirement, etc., under which commercial sales of the products or services are made;

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

5. Revise section 12.207 to read as follows:

12.207 Contract type.

(a) Except as provided in paragraph (b) of this section, agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items.

(b)(1) A time-and-materials contract or labor-hour contract (see Subpart 16.6) may be used for the acquisition of commercial services when—

(i) The service is acquired under a contract awarded using competitive procedures; and

(ii) The contracting officer—

(A) Executes a determination and findings (D&F) for the contract, in accordance with paragraph (b)(2) of this section (but see paragraph (c) of this section for indefinite-delivery contracts), that no other contract type authorized by this subpart is suitable;

(B) Includes a ceiling price in the contract or order that the contractor exceeds at its own risk; and

(C) Authorizes any subsequent change in the ceiling price only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

(2) Each D&F required by paragraph (b)(1)(ii)(A) of this section shall contain sufficient facts and rationale to justify that no other contract type authorized by this subpart is suitable. At a minimum, the D&F shall—

(i) Include a description of the market research conducted (see 10.002(e));

(ii) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of certainty; and

(iii) Establish that the requirement has been structured to maximize the use of fixed price contracts (e.g., by limiting the value or length of the Time and Material/Labor Hour contract or order) on future acquisitions for the same or similar requirements.

(c)(1) Indefinite-delivery contracts (see Subpart 16.5) may be used when—

(i) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or

(ii) Rates are established for commercial services acquired on a time-and-materials or labor-hour basis.

(2) When an indefinite-delivery contract is awarded with services priced on a time-and-materials or labor-hour basis, contracting officers shall, to the maximum extent practicable, also structure the contract to allow issuance of orders on a firm-fixed-price or fixed-price with economic price adjustment basis. For such contracts, the contracting officer shall execute the D&F required by paragraph (b)(2) of this section, for each order placed on a time-and-materials or labor-hour basis. Placement of orders shall be in accordance with Subpart 16.5.

(3) If an indefinite-delivery contract only allows for the issuance of orders on a time-and-materials or labor-hour basis, the D&F required by paragraph (b)(2) of this section shall be executed to support the basic contract and shall also explain why providing for an alternative firm-fixed-price or fixed-price with economic price adjustment pricing structure is not practicable. The D&F for this contract shall be approved one level above the contracting officer. Placement of orders shall be in accordance with Subpart 16.5.

(d) The contract types authorized by this subpart may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (see 16.202–1 and 16.203–1).

(e) Use of any contract type other than those authorized by this subpart to acquire commercial items is prohibited.

6. Add section 12.216 to read as follows:

12.216 Subcontract consent.

(a) When a time and materials or labor hour contract is awarded pursuant to 12.207(b), Alternate I to the clause at 52.212–4 is used. Alternate I includes a subcontract consent provision that requires the contractor to obtain the contracting officer's consent prior to awarding certain subcontracts.

(b) When the contractor has an approved purchasing system, the contracting officer shall identify, in an addendum to the clause, those subcontracts that will require consent.

(c) When the contractor does not have an approved purchasing system, the contracting officer shall identify, in an addendum to the clause—

(1) Those subcontracts reviewed during proposal evaluation for which consent is not required after contract award;

(2) Those subcontracts for which consent is not required by the clause, but which the contracting officer has determined that an individual consent action is required to protect the Government; and

(3) Any other exceptions to the standard consent requirements.

(d) The contracting officer shall consider the risk, complexity and dollar value of anticipated subcontracts when determining the consent requirements.

7. Amend section 12.301 by revising paragraph (b)(3) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b)* * *

(3) The clause at 52.212–4, Contract Terms and Conditions—Commercial Items. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference (see Block 27, SF 1449). Use this clause with its Alternate I when a time and materials or labor hour contract will be awarded. The contracting officer may tailor this clause in accordance with 12.302, except that paragraph (u) of Alternate I may be tailored only for indefinite delivery contracts and only to indicate that subcontract consent requirements apply to individual orders and not the basic contract.

* * * * *

8. Amend section 12.403 by revising paragraph (d)(1)(i) to read as follows:

12.403 Termination.

* * * * *

(d)* * *

(1)* * *

(i)(A) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination for fixed price or fixed price with economic price adjustment contracts; or

(B) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule; and

* * * * *

PART 16—TYPES OF CONTRACTS

9. Amend section 16.601 by adding a sentence at the end of the introductory text of paragraph (b) to read as follows:

16.601 Time-and-materials contracts.

* * * * *

(b) *Application.* * * * See 12.207(b) for the use of time-and-material contracts for certain commercial services.

* * * * *

10. Amend section 16.602 by adding a sentence at the end of the paragraph to read as follows:

16.602 Labor-hour contracts.

* * * See 12.207(b) for the use of labor hour contracts for certain commercial services.

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

11. Amend section 44.302 by revising the second sentence of paragraph (a) to read as follows:

44.302 Requirements.

(a)* * * If a contractor's sales to the Government (excluding competitively awarded firm-fixed-price and competitively awarded fixed-price with economic price adjustment contracts and firm-fixed price or fixed-price with economic price adjustment sales of commercial items pursuant to Part 12) are expected to exceed $25 million during the next 12 months, perform a review to determine if a CPSR is needed.* * *

* * * * *

12. Amend section 44.303 by revising the second sentence of the introductory paragraph to read as follows:

44.303 Extent of review.

* * * Unless segregation of subcontracts is impracticable, this evaluation shall not include subcontracts awarded by the contractor exclusively in support of Government contracts that are competitively awarded firm-fixed-price, competitively awarded fixed-price with economic price adjustment, or firm-fixed price or fixed-price with economic price adjustment awarded for commercial items pursuant to Part 12.* * *

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

13. Amend section 52.212–4 by—

a. Revising the date of the clause;

b. Adding a new fourth sentence to the introductory text of paragraph (a) of the clause; and

c. Adding Alternate I to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (DATE)

(a) *Inspection/Acceptance.** * * If repair/replacement or reperformance will not correct the defects or is not possible, the

Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services.* * *

* * * * *

Alternate I (Date). When a time and materials or labor-hour contract is contemplated, substitute the following paragraphs (a), (e), (i) and (l) for those in the basic clause and add the following paragraph (u) to the basic clause.

(a) *Inspection/Acceptance.* (1) The Government has the right to inspect and test all materials furnished and services performed under this contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or any subcontractor engaged in contract performance. The Government will perform inspections and tests in a manner that will not unduly delay the work.

(2) If the Government performs inspection or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(3) Unless otherwise specified in the contract, the Government will accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they will be presumed accepted 60 days after the date of delivery, unless accepted earlier.

(4) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, the Government may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (a)(6) of this clause, the cost of replacement or correction shall be determined under paragraph (i) of this clause, but the ''hourly rate'' for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified below, the portion of the ''hourly rate'' attributable to profit shall be 10 percent. The Contractor shall not tender for acceptance materials and services required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

[*Insert portion of labor rate attributable to profit.*]

(5)(i) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by the Government), the Government may—

(A) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(B) Terminate this contract for cause.

(ii) Failure to agree to the amount of increased cost to be charged to the Contractor shall be a dispute under the Disputes clause of the contract.

(6) Notwithstanding paragraphs (a)(4) and (a)(5) of this clause, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to—

(i) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(ii) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(7) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.

(8) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.

(9) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

* * * * *

(e) *Definitions.* (1) The clause at FAR 52.202–1, Definitions, is incorporated herein by reference. As used in this clause—

Approved purchasing system means a Contractor's purchasing system that has been reviewed and approved in accordance with Part 44 of the Federal Acquisition Regulation (FAR).

Consent to subcontract means the Contracting Officer's written consent for the Contractor to enter into a particular subcontract.

Direct materials means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

Materials means—

(1) Direct materials, including supplies and services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;

(2) Subcontracts for supplies and services;

(3) Other direct costs (*e.g.*, travel, computer usage charges, etc.); or

(4) Indirect costs specifically provided for in this clause.

Subcontract means any contract, as defined in FAR Subpart 2.1, entered into by a subcontractor to furnish supplies or services for performance of the prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

* * * * *

(i) *Payments.* (1) *Services accepted.* Payment shall be made for services accepted by the Government that have been delivered to the delivery destination(s) set forth in this contract. The Government will pay the Contractor as follows upon the submission of commercial invoices approved by the Contracting Officer:

(i) *Hourly rate.* The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the contract by the number of direct labor hours performed. Fractional parts of an hour shall be payable on a prorated basis. Invoices may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer) to the Contracting Officer or the Contracting Officer's representative. When requested by the Contracting Officer or the Contracting Officer's representative, the Contractor shall substantiate invoices (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment, individual daily job timecards, records that verify the employees meet the qualifications for the labor categories specified in the contract, or other substantiation specified in the contract. Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and the Contracting Officer approves overtime work in advance, overtime rates shall be negotiated. Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract. If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(ii) *Materials.* (A) If the Contractor furnishes its own materials that meet the definition of a commercial item at 2.101, the price to be paid for such materials shall be the Contractor's established catalog or the market price, adjusted to reflect the—

(*1*) Quantities being acquired; and

(*2*) Actual cost of any modifications necessary because of contract requirements.

(B) *Subcontracts.* (*1*) Unless the subcontractor is listed in paragraph (i)(1)(ii)(B)(*2*) of this clause, subcontract costs will be reimbursed at actual costs as specified in (i)(1)(ii)(C) of this clause.

(*2*) Provided the subcontract agreement requires the contractor to substantiate the subcontract hours and employee qualification, the contractor shall be reimbursed at the hourly rates prescribed in the schedule for the following subcontractors: [*Insert subcontractor name(s) or, if no subcontracts are to be reimbursed at the hourly rates prescribed in the schedule, ''None.'' If this is an indefinite delivery contract, the Contracting Officer may insert ''Each order must list separately the subcontractor(s) for that order or, if no subcontracts under that order are to be reimbursed at the hourly rates prescribed in the schedule, insert 'None'.''*]

(C) Except as provided for in paragraphs (i)(1)(ii)(A) and (B) of this clause, the Government will reimburse the Contractor the actual cost of materials (less any rebates, refunds, or discounts received by or accrued to the contractor) provided the Contractor—

(*1*) Has made payments for materials in accordance with the terms and conditions of the agreement or invoice; or

(*2*) Makes these payments within 30 days of the submission of the Contractor's payment request to the Government and such payment is in accordance with the terms and conditions of the agreement or invoice.

(D) To the extent able, the Contractor shall—

(*1*) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(*2*) Give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor.

(E) *Other Costs*. Unless listed below, other direct and indirect costs will not be reimbursed.

(*1*) *Other Direct Costs*. The Government will reimburse the Contractor on the basis of actual cost for the following, provided such costs comply with the requirements in paragraph (i)(1)(ii)(C) of this clause: [*Insert each element of other direct costs (e.g., travel, computer usage charges, etc.) Insert ''None'' if no reimbursement for other direct costs will be provided*.]

(*2*) *Indirect Costs (Material Handling, Subcontract Administration, etc.)*. The Government will reimburse the Contractor for indirect costs on a pro-rata basis over the period of contract performance at the following fixed price: [*Insert a fixed amount for the indirect costs and payment schedule. Insert ''$0'' if no fixed price reimbursement for indirect costs will be provided*.]

(2) *Total cost*. It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during the performance of this contract the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performing this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(3) *Ceiling price*. The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(4) *Access to records*. At any time before final payment under this contract, the Contracting Officer (or authorized representative) will have access to the following (access shall be limited to the listing below unless otherwise agreed to by the Contractor and the Contracting Officer):

(i) Records that verify the employees whose time has been included in any invoice meet the qualifications for the labor categories specified in the contract;

(ii) For labor hours (including any subcontractor hours reimbursed at the hourly rate in the schedule), when timecards are required as substantiation for payment—

(A) The original timecards;

(B) The Contractor's timekeeping procedures;

(C) Contractor records that show the distribution of labor between jobs or contracts; and

(D) Employees whose time has been included in any invoice for the purpose of verifying that these employees have worked the hours shown on the invoices.

(iii) For material and subcontract costs that are reimbursed on the basis of actual cost—

(A) Any invoices or subcontract agreements substantiating material costs; and

(B) Any documents supporting payment of those invoices.

(5) *Overpayments/Underpayments*. (i) Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices, that are found by the Contracting Officer not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. The Contractor shall promptly pay any such reduction within 30 days unless the parties agree otherwise. The Government within 30 days will pay any such increases, unless the parties agree otherwise. Payment will be made by check. If the Contractor becomes aware of a duplicate invoice payment or that the Government has otherwise overpaid on an invoice payment, the Contractor shall immediately notify the Contracting Officer and request instructions for disposition of the overpayment.

(ii) Upon receipt and approval of the invoice designated by the Contractor as the ''completion invoice'' and supporting documentation, and upon compliance by the Contractor with all terms of this contract, any outstanding balances will be paid within 30 days unless the parties agree otherwise. The completion invoice, and supporting documentation, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(6) *Release of claims*. The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(i) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible to exact statement by the Contractor.

(ii) Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier.

(iii) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

(7) *Prompt payment*. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(8) *Electronic Funds Transfer (EFT)*. If the Government makes payment by EFT, see paragraph (b) of the FAR clause at 52.212–5 for the appropriate EFT clause.

(9) *Discount*. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

* * * * *

(l) *Termination for the Government's convenience*. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid an amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended

before the effective date of termination by the hourly rate(s) in the contract, less any hourly rate payments already made to the Contractor plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system that have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided.

* * * * *

(u) *Subcontracts.* (1) If the Contractor has an approved purchasing system, the Contractor shall obtain the Contracting Officer's written consent only before placing subcontracts identified in an addendum to this clause.

(2) If the Contractor does not have an approved purchasing system, consent to subcontract is required for any subcontract that—

(i) Is of the cost-reimbursement, time-and-materials, or labor-hour type; or

(ii) Is fixed-price and exceeds—

(A) For a contract awarded by the Department of Defense, the Coast Guard, or the National Aeronautics and Space Administration, the greater of the simplified acquisition threshold or 5 percent of the total estimated cost of the contract; or

(B) For a contract awarded by a civilian agency other than the Coast Guard and the National Aeronautics and Space Administration, either the simplified acquisition threshold or 5 percent of the total estimated cost of the contract.

(iii) Exceptions to this requirement may be as specified by the Contracting Officer in an addendum to this clause.

(3) The Contractor shall notify the Contracting Officer reasonably in advance of placing any subcontract or modification thereof for which consent is required under paragraph (u)(1) or (u)(2) of this clause, including the following information:

(i) A description of the supplies or services to be subcontracted.

(ii) Identification of the type of subcontract to be used.

(iii) Identification of the proposed subcontractor.

(iv) Extent of competition or basis for determining price reasonableness.

(v) The proposed subcontract amount.

(vi) If a time-and-materials or labor-hour subcontract, a list of the labor categories, corresponding labor rates and estimated hours.

(4) The Contractor is not required to notify the Contracting Officer in advance of entering into any subcontract for which consent is not required under paragraph (u)(1) or (u)(2) of this clause.

(5) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system shall constitute a determination—

(i) Of the acceptability of any subcontract terms or conditions; or

(ii) Relieve the Contractor of any responsibility for performing this contract.

(6) No subcontract or modification thereof placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement type subcontracts shall not exceed the fee limitations in FAR 15.404–4(c)(4)(i).

(7) The Contractor shall give the Contracting Officer immediate written notice of any action or suit filed and prompt notice of any claim made against the Contractor by any subcontractor or vendor that, in the opinion of the Contractor, may result in litigation related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

(8) If the contractor enters into any subcontract that requires consent without obtaining such consent, the Government will not be liable for any costs incurred under that subcontract prior to the date the contractor obtains the required consent. Any payment of subcontract costs incurred prior to the date of the consent will be reimbursed only if the Contracting Officer subsequently provides the consent required by paragraph (u) of this clause.

[FR Doc. 05–18965 Filed 9–23–05; 8:45 am]

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Federal Register

Monday,
September 26, 2005

Part IV

The President

Proclamation 7935—Gold Star Mother's Day, 2005

Federal Register
Vol. 70, No. 185
Monday, September 26, 2005

Presidential Documents

Title 3—

The President

Proclamation 7935 of September 21, 2005

Gold Star Mother's Day, 2005

By the President of the United States of America

A Proclamation

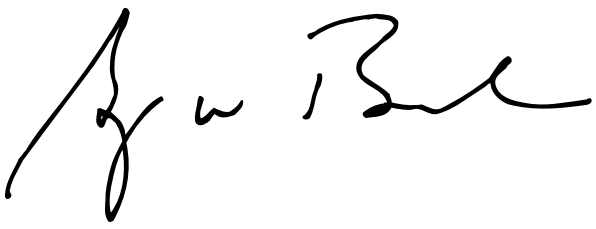
The men and women of America's Armed Forces selflessly serve to protect our Nation, and they are among our greatest heroes. From the trenches of World War I to the beaches of Normandy, from Korea to Vietnam, from Afghanistan to Iraq, many courageous members of our military have given their lives so that Americans could live in freedom and security. On Gold Star Mother's Day, we recognize and pray for the devoted and patriotic mothers of these men and women in uniform who have made the ultimate sacrifice in defense of our liberty.

America's Gold Star Mothers carry a great burden of grief, yet they show a tremendous spirit of generosity in helping their fellow citizens. With kindness and understanding, they support members of our Armed Forces and their families, provide vital services to veterans, help to educate young people about good citizenship and our Nation's founding ideals, and bring comfort to many in need. We commend these proud women for their compassion, commitment, and patriotism, and our Nation will always honor them for their sacrifice and service.

The Congress, by Senate Joint Resolution 115 of June 23, 1936 (49 Stat. 1895 as amended), has designated the last Sunday in September as ''Gold Star Mother's Day'' and has authorized and requested the President to issue a proclamation in its observance. On this day, we express our deep gratitude to our Nation's Gold Star Mothers, and we ask God's blessings on them and on their families.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, do hereby proclaim Sunday, September 25, 2005, as Gold Star Mother's Day. I call upon all Government officials to display the flag of the United States over Government buildings on this solemn day. I also encourage the American people to display the flag and hold appropriate ceremonies as a public expression of our Nation's sympathy and respect for our Gold Star Mothers.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-first day of September, in the year of our Lord two thousand five, and of the Independence of the United States of America the two hundred and thirtieth.



[FR Doc. 05–19305
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10 Parts:			
1–50	(869–056–00027–8)	61.00	Jan. 1, 2005
51–199	(869–056–00028–6)	58.00	Jan. 1, 2005
200–499	(869–056–00029–4)	46.00	Jan. 1, 2005
500–End	(869–056–00030–8)	62.00	Jan. 1, 2005
11	(869–056–00031–6)	41.00	Jan. 1, 2005
12 Parts:			
1–199	(869–056–00032–4)	34.00	Jan. 1, 2005
200–219	(869–056–00033–2)	37.00	Jan. 1, 2005
220–299	(869–056–00034–1)	61.00	Jan. 1, 2005
300–499	(869–056–00035–9)	47.00	Jan. 1, 2005
500–599	(869–056–00036–7)	39.00	Jan. 1, 2005
600–899	(869–056–00037–5)	56.00	Jan. 1, 2005
900–End	(869–056–00038–3)	50.00	Jan. 1, 2005
13	(869–056–00039–1)	55.00	Jan. 1, 2005
14 Parts:			
1–59	(869–056–00040–5)	63.00	Jan. 1, 2005
60–139	(869–056–00041–3)	61.00	Jan. 1, 2005
140–199	(869–056–00042–1)	30.00	Jan. 1, 2005
200–1199	(869–056–00043–0)	50.00	Jan. 1, 2005
1200–End	(869–056–00044–8)	45.00	Jan. 1, 2005
15 Parts:			
0–299	(869–056–00045–6)	40.00	Jan. 1, 2005
300–799	(869–056–00046–4)	60.00	Jan. 1, 2005
800–End	(869–056–00047–2)	42.00	Jan. 1, 2005
16 Parts:			
0–999	(869–056–00048–1)	50.00	Jan. 1, 2005
1000–End	(869–056–00049–9)	60.00	Jan. 1, 2005
17 Parts:			
1–199	(869–056–00051–1)	50.00	Apr. 1, 2005
200–239	(869–056–00052–9)	58.00	Apr. 1, 2005
240–End	(869–056–00053–7)	62.00	Apr. 1, 2005
18 Parts:			
1–399	(869–056–00054–5)	62.00	Apr. 1, 2005
400–End	(869–056–00055–3)	26.00	[9]Apr. 1, 2005
19 Parts:			
1–140	(869–056–00056–1)	61.00	Apr. 1, 2005
141–199	(869–056–00057–0)	58.00	Apr. 1, 2005
200–End	(869–056–00058–8)	31.00	Apr. 1, 2005
20 Parts:			
1–399	(869–056–00059–6)	50.00	Apr. 1, 2005
400–499	(869–056–00060–0)	64.00	Apr. 1, 2005
500–End	(869–056–00061–8)	63.00	Apr. 1, 2005
21 Parts:			
1–99	(869–056–00062–6)	42.00	Apr. 1, 2005
100–169	(869–056–00063–4)	49.00	Apr. 1, 2005
170–199	(869–056–00064–2)	50.00	Apr. 1, 2005
200–299	(869–056–00065–1)	17.00	Apr. 1, 2005
300–499	(869–056–00066–9)	31.00	Apr. 1, 2005
500–599	(869–056–00067–7)	47.00	Apr. 1, 2005
600–799	(869–056–00068–5)	15.00	Apr. 1, 2005
800–1299	(869–056–00069–3)	58.00	Apr. 1, 2005
1300–End	(869–056–00070–7)	24.00	Apr. 1, 2005
22 Parts:			
1–299	(869–056–00071–5)	63.00	Apr. 1, 2005
300–End	(869–056–00072–3)	45.00	Apr. 1, 2005
23	(869–056–00073–1)	45.00	Apr. 1, 2005
24 Parts:			
0–199	(869–056–00074–0)	60.00	Apr. 1, 2005
200–499	(869–056–00074–0)	50.00	Apr. 1, 2005
500–699	(869–056–00076–6)	30.00	Apr. 1, 2005
700–1699	(869–056–00077–4)	61.00	Apr. 1, 2005
1700–End	(869–056–00078–2)	30.00	Apr. 1, 2005
25	(869–056–00079–1)	63.00	Apr. 1, 2005
26 Parts:			
§§ 1.0–1–1.60	(869–056–00080–4)	49.00	Apr. 1, 2005
§§ 1.61–1.169	(869–056–00081–2)	63.00	Apr. 1, 2005
§§ 1.170–1.300	(869–056–00082–1)	60.00	Apr. 1, 2005
§§ 1.301–1.400	(869–056–00083–9)	46.00	Apr. 1, 2005
§§ 1.401–1.440	(869–056–00084–7)	62.00	Apr. 1, 2005
§§ 1.441–1.500	(869–056–00085–5)	57.00	Apr. 1, 2005
§§ 1.501–1.640	(869–056–00086–3)	49.00	Apr. 1, 2005
§§ 1.641–1.850	(869–056–00087–1)	60.00	Apr. 1, 2005
§§ 1.851–1.907	(869–056–00088–0)	61.00	Apr. 1, 2005
§§ 1.908–1.1000	(869–056–00089–8)	60.00	Apr. 1, 2005
§§ 1.1001–1.1400	(869–056–00090–1)	61.00	Apr. 1, 2005
§§ 1.1401–1.1550	(869–056–00091–0)	55.00	Apr. 1, 2005
§§ 1.1551–End	(869–056–00092–8)	55.00	Apr. 1, 2005
2–29	(869–056–00093–6)	60.00	Apr. 1, 2005
30–39	(869–056–00094–4)	41.00	Apr. 1, 2005
40–49	(869–056–00095–2)	28.00	Apr. 1, 2005
50–299	(869–056–00096–1)	41.00	Apr. 1, 2005

Title	Stock Number	Price	Revision Date
300–499	(869–056–00097–9)	61.00	Apr. 1, 2005
500–599	(869–056–00098–7)	12.00	[5]Apr. 1, 2005
600–End	(869–056–00099–5)	17.00	Apr. 1, 2005
27 Parts:			
1–199	(869–056–00100–2)	64.00	Apr. 1, 2005
200–End	(869–056–00101–1)	21.00	Apr. 1, 2005
28 Parts:			
0–42	(869–052–00101–5)	61.00	July 1, 2004
43–End	(869–052–00102–3)	60.00	July 1, 2004
29 Parts:			
0–99	(869–056–00104–5)	50.00	July 1, 2005
100–499	(869–056–00105–3)	23.00	July 1, 2005
500–899	(869–056–00106–1)	61.00	July 1, 2005
900–1899	(869–056–00107–0)	36.00	[7]July 1, 2005
1900–1910 (§§ 1900 to 1910.999)	(869–056–00108–8)	61.00	July 1, 2005
1910 (§§ 1910.1000 to end)	(869–056–00109–6)	58.00	July 1, 2005
*1911–1925	(869–056–00110–0)	30.00	July 1, 2005
1926	(869–056–00111–8)	50.00	July 1, 2005
1927–End	(869–052–00111–2)	62.00	July 1, 2004
30 Parts:			
1–199	(869–056–00113–4)	57.00	July 1, 2005
200–699	(869–052–00113–9)	50.00	July 1, 2005
700–End	(869–056–00115–1)	58.00	July 1, 2005
31 Parts:			
*0–199	(869–056–00116–9)	41.00	July 1, 2005
200–End	(869–052–00116–3)	65.00	July 1, 2004
32 Parts:			
1–39, Vol. I		15.00	[2]July 1, 1984
1–39, Vol. II		19.00	[2]July 1, 1984
1–39, Vol. III		18.00	[2]July 1, 1984
1–190	(869–056–00119–3)	61.00	July 1, 2005
191–399	(869–056–00120–7)	63.00	July 1, 2005
400–629	(869–056–00121–5)	50.00	July 1, 2005
630–699	(869–056–00122–3)	37.00	July 1, 2005
700–799	(869–056–00123–1)	46.00	July 1, 2005
800–End	(869–056–00124–0)	47.00	July 1, 2005
33 Parts:			
1–124	(869–052–00123–6)	57.00	July 1, 2004
125–199	(869–052–00124–4)	61.00	July 1, 2004
200–End	(869–052–00125–2)	57.00	July 1, 2004
34 Parts:			
1–299	(869–056–00128–2)	50.00	July 1, 2005
300–399	(869–056–00129–1)	40.00	[7]July 1, 2005
400–End	(869–052–00128–7)	61.00	July 1, 2004
35	(869–052–00129–5)	10.00	[6]July 1, 2004
36 Parts			
1–199	(869–052–00130–9)	37.00	July 1, 2004
200–299	(869–056–00132–1)	37.00	July 1, 2005
300–End	(869–056–00133–9)	61.00	July 1, 2005
37	(869–052–00133–3)	58.00	July 1, 2004
38 Parts:			
*0–17	(869–056–00135–5)	60.00	July 1, 2005
18–End	(869–052–00135–0)	62.00	July 1, 2004
***39**	(869–056–00139–1)	42.00	July 1, 2005
40 Parts:			
1–49	(869–052–00137–6)	60.00	July 1, 2004
50–51	(869–052–00138–4)	45.00	July 1, 2004
52 (52.01–52.1018)	(869–052–00139–2)	60.00	July 1, 2004
52 (52.1019–End)	(869–052–00140–6)	61.00	July 1, 2004
53–59	(869–052–00141–4)	31.00	July 1, 2004
60 (60.1–End)	(869–056–00143–6)	58.00	July 1, 2005
60 (Apps)	(869–052–00143–1)	57.00	July 1, 2004
61–62	(869–056–00145–2)	45.00	July 1, 2005
*63 (63.1–63.599)	(869–056–00146–1)	58.00	July 1, 2005
63 (63.600–63.1199)	(869–056–00147–9)	50.00	July 1, 2005
63 (63.1200–63.1439)	(869–052–00147–3)	50.00	July 1, 2004
63 (63.1440–63.8830)	(869–052–00148–1)	64.00	July 1, 2004
63 (63.6580–63.8830)	(869–056–00150–9)	32.00	July 1, 2005
63 (63.8980–End)	(869–056–00151–7)	35.00	[7]July 1, 2005
64–71	(869–056–00152–5)	29.00	July 1, 2005
72–80	(869–056–00153–5)	62.00	July 1, 2005
81–85	(869–052–00152–0)	60.00	July 1, 2004
86 (86.1–86.599–99)	(869–052–00153–8)	58.00	July 1, 2004
86 (86.600–1–End)	(869–052–00154–6)	50.00	July 1, 2004
87–99	(869–052–00155–4)	60.00	July 1, 2004
100–135	(869–052–00156–2)	45.00	July 1, 2004
136–149	(869–052–00157–1)	61.00	July 1, 2004
150–189	(869–052–00158–9)	50.00	July 1, 2004
*190–259	(869–056–00161–4)	39.00	July 1, 2005
260–265	(869–052–00160–1)	50.00	July 1, 2004
*266–299	(869–056–00163–1)	50.00	July 1, 2005
300–399	(869–056–00164–9)	42.00	July 1, 2005
400–424	(869–056–00165–7)	56.00	[8]July 1, 2005
425–699	(869–052–00164–3)	61.00	July 1, 2004
700–789	(869–056–00167–3)	61.00	July 1, 2005
790–End	(869–052–00166–0)	61.00	July 1, 2004
41 Chapters:			
1, 1–1 to 1–10		13.00	[3]July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3]July 1, 1984
3–6		14.00	[3]July 1, 1984
7		6.00	[3]July 1, 1984
8		4.50	[3]July 1, 1984
9		13.00	[3]July 1, 1984
10–17		9.50	[3]July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3]July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3]July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3]July 1, 1984
19–100		13.00	[3]July 1, 1984
1–100	(869–056–00169–0)	24.00	July 1, 2005
101	(869–056–00170–3)	21.00	July 1, 2005
102–200	(869–052–00169–4)	56.00	July 1, 2004
201–End	(869–052–00170–8)	24.00	July 1, 2004
42 Parts:			
1–399	(869–052–00171–6)	61.00	Oct. 1, 2004
400–429	(869–052–00172–4)	63.00	Oct. 1, 2004
430–End	(869–052–00173–2)	64.00	Oct. 1, 2004
43 Parts:			
1–999	(869–052–00174–1)	56.00	Oct. 1, 2004
1000–end	(869–052–00175–9)	62.00	Oct. 1, 2004
44	(869–052–00176–7)	50.00	Oct. 1, 2004
45 Parts:			
1–199	(869–052–00177–5)	60.00	Oct. 1, 2004
200–499	(869–052–00178–3)	34.00	Oct. 1, 2004
500–1199	(869–052–00179–1)	56.00	Oct. 1, 2004
1200–End	(869–052–00180–5)	61.00	Oct. 1, 2004
46 Parts:			
1–40	(869–052–00181–3)	46.00	Oct. 1, 2004
41–69	(869–052–00182–1)	39.00	Oct. 1, 2004
70–89	(869–052–00183–0)	14.00	Oct. 1, 2004
90–139	(869–052–00184–8)	44.00	Oct. 1, 2004
140–155	(869–052–00185–6)	25.00	Oct. 1, 2004
156–165	(869–052–00186–4)	34.00	Oct. 1, 2004
166–199	(869–052–00187–2)	46.00	Oct. 1, 2004
200–499	(869–052–00188–1)	40.00	Oct. 1, 2004
500–End	(869–052–00189–9)	25.00	Oct. 1, 2004
47 Parts:			
0–19	(869–052–00190–2)	61.00	Oct. 1, 2004
20–39	(869–052–00191–1)	46.00	Oct. 1, 2004
40–69	(869–052–00192–9)	40.00	Oct. 1, 2004
70–79	(869–052–00193–8)	63.00	Oct. 1, 2004
80–End	(869–052–00194–5)	61.00	Oct. 1, 2004
48 Chapters:			
1 (Parts 1–51)	(869–052–00195–3)	63.00	Oct. 1, 2004
1 (Parts 52–99)	(869–052–00196–1)	49.00	Oct. 1, 2004
2 (Parts 201–299)	(869–052–00197–0)	50.00	Oct. 1, 2004
3–6	(869–052–00198–8)	34.00	Oct. 1, 2004
7–14	(869–052–00199–6)	56.00	Oct. 1, 2004
15–28	(869–052–00200–3)	47.00	Oct. 1, 2004

Title	Stock Number	Price	Revision Date
29–End	(869–052–00201–1)	47.00	Oct. 1, 2004
49 Parts:			
1–99	(869–052–00202–0)	60.00	Oct. 1, 2004
100–185	(869–052–00203–8)	63.00	Oct. 1, 2004
186–199	(869–052–00204–6)	23.00	Oct. 1, 2004
200–399	(869–052–00205–4)	64.00	Oct. 1, 2004
400–599	(869–052–00206–2)	64.00	Oct. 1, 2004
600–999	(869–052–00207–1)	19.00	Oct. 1, 2004
1000–1199	(869–052–00208–9)	28.00	Oct. 1, 2004
1200–End	(869–052–00209–7)	34.00	Oct. 1, 2004
50 Parts:			
1–16	(869–052–00210–1)	11.00	Oct. 1, 2004
17.1–17.95	(869–052–00211–9)	64.00	Oct. 1, 2004
17.96–17.99(h)	(869–052–00212–7)	61.00	Oct. 1, 2004
17.99(i)–end and 17.100–end	(869–052–00213–5)	47.00	Oct. 1, 2004
18–199	(869–052–00214–3)	50.00	Oct. 1, 2004
200–599	(869–052–00215–1)	45.00	Oct. 1, 2004
600–End	(869–052–00216–0)	62.00	Oct. 1, 2004
CFR Index and Findings Aids	(869–052–00049–3)	62.00	Jan. 1, 2004
Complete 2005 CFR set		1,342.00	2005
Microfiche CFR Edition:			
Subscription (mailed as issued)		325.00	2005
Individual copies		4.00	2005
Complete set (one-time mailing)		325.00	2004
Complete set (one-time mailing)		298.00	2003

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2004, through January 1, 2005. The CFR volume issued as of January 1, 2004 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2004. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 2000, through July 1, 2004. The CFR volume issued as of July 1, 2000 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2004, through July 1, 2005. The CFR volume issued as of July 1, 2004 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2004, through July 1, 2005. The CFR volume issued as of July 1, 2003 should be retained.

[9] No amendments to this volume were promulgated during the period April 1, 2004, through April 1, 2005. The CFR volume issued as of April 1, 2004 should be retained.